TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 54

HOWARD F. CORAY, ANCILLARY ADMINISTRATOR OF THE ESTATE OF WILLIAM FRANK LUCUS, DECEASED, PETITIONER,

vs.

SOUTHERN PACIFIC COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

PETITION FOR CERTIORARI FILED MAY 16, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT IN AND FOR WEBER COUNTY, STATE OF UTAH

No. 20205

HOWARD F. CORAY, Ancillary Administrator of the Estate of William Frank Lucus, Deceased, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, Defendant

COMPLAINT—Filed February 8, 1945

Comes now the plaintiff and for cause of action against the defendant alleges:

First Cause of Action

1. That William Frank Lucus died intestate on the 24th day of May, 1944, in the County of Box Elder, State of Utah; that thereafter, to-wit: on or about the 1st day of August, 1944, Letters of Administration were issued to one Edith B. Lucus by the Superior Court of the State of California, in and for the County of Los Angeles, and ever since said day, the said Edith B. Lucus has been, and now is, the duly appointed, qualified and acting administratrix of the said estate in California. That subsequently, and at the request of the said Edith B. Lucus, Howard F. Coray applied for Ancillary Letters of Administration in the District Court of the State of Utah, in and for Box Elder County; that Ancillary Letters of Administration were thereupon issued to said Howard F. Coray by said Court on or about the 22nd day of December, 1944; and ever since said date, Howard F. Coray has been, and now is, the duly appointed, qualified and acting administrator of said estate in the State of Utah.

[fol. 2] 2. That this action is brought by the plaintiff for and on behalf of the dependent heirs of William Frank Lucus, deceased, to-wit: Edith B. Lucus, who is the widow of said deceased. That said Edith B. Lucus was wholly dependent upon said decedent for her support and maintenance.

3. That at all times mentioned herein, the defendant company was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky; that said corporation is, and at all times mentioned herein was, duly qualified to do business in the state of Utah, with its principal place of business in Utah located in the City of Ogden, County of Weber.

4. That at all times herein alleged; the defendant was engaged as a common carrier in interstate commerce and transportation within the state of Utah, and William Frank Lucus, deceased, was employed by said defendant in such interstate commerce, and that the injuries to him which resulted in his death as herein complained of arose in the course of and while said defendant and the decedent were mutually engaged in the conduct of said interstate commerce and transportation and while defendant was acting as a common carrier by rail in interstate commerce. That this action is brought by virtue of the provisions of the so-called Federal Employer's Liability Act and Safety Appliance Act, 45 U. S. C. A. 51 et seq., 2 et seq.

5. That the accident causing the injuries which resulted in the death of William Frank Lucus and out of which this cause of action arose took place and occurred upon and along the main line tracks of the defendant company at a point approximately two miles west of defendant's Newfoundland station in the State of Utah, County of Box Elder. That the nearest mile post on defendant's tracks to the point on said tracks where William Frank Lucus was [fol. 3] killed was mile post No. 704. That said death occurred at approximately 3:40 p. m. Mountain War Time on the 24th day of May, 1944.

6. That at all times herein mentioned, the defendant operated in its interstate commerce business its local freight trains and passenger trains over and upon and along the aforesaid main line tracks extending in a general easterly and westerly direction from Ogden City, Utah, to points outside of the State of Utah located to the north and west of Ogden City, State of Utah; and situated on said main line track is the aforesaid Newfoundland station.

7. That the decedent, William Frank Lucus, at and prior to the time of his death, was employed by the defendant as a signalman; that on the date of his death, the decedent in

the usual and ordinary course of his employment was required to travel by means of a small motor track car upon the aforesaid main line track of the defendant from the station at Lemay, Utah, toward the station known as the Newfoundland station in Box Elder County, Utah.

8. That at the aforesaid time and place, the defendant, by and through its agents, servants and employees, was operating a freight train known as No. 1/582 consisting of approximately 82 cars and pulled by engine No. 3730 along said main line track proceeding in an easterly direction. That as said freight train left the Lemay station to go on toward the Newfoundland station the deceased boarded the aforesaid motor track car and followed said freight train out of said Lemay station along said main line track. That as said freight train proceeded east on said track and when it reached a point approximately two miles west of the Newfoundland station, said train made an abrupt emergency stop immediately in front of the motor car upon which deceased was riding, and that the motor car on which deceased was riding and which was following the aforesaid freight train crashed into the rear end of said freight train causing the deceased severe and grievous injuries from which he immediately died.

[fol. 4] 9. That the defendant was reckless, careless and negligent at the time aforesaid in the operation of its trains, locomotives, and equipment in the following particulars:

a. That the defendant hauled and permitted to be hauled and used in interstate commerce and on its tracks the aforesaid defective refrigerator car known as car PFE 29435 which refrigerator car was defective in that the threads on a triple valve thereon were worn so that the triple union nut became disconnected from the triple valve allowing the air pressure in the braking system of said train to escape so as to set the brakes and force the freight train to come to an immediate, abrupt and sudden stop. As a result thereof; the decedent was caused to suffer, and did suffer, the grievous injuries from which he then and there died as aforesaid.

b. In failing to discover the defective triple valve on the aforesaid refrigerator car when it well knew; or in the exercise of due care should have known, that the triple union nut on such a worn and defective valve would become dis-

connected and would cause the release of air pressure on the braking system of said train and thereby set the brakes of said train and cause it to come to an abrupt, immediate and sudden stop.

10. That by reason of each and all of the acts of negligence on the part of the defendant in the use, maintenance, management and operation of its said cars, locomotive, and equipment as herein set forth, the decedent, William Frank Lucus, received grievous injuries from which he immediately died.

11. That at the time of his death, caused by the negligence and carelessness of defendant as aforesaid, the decedent, William Frank Lucus, was a strong, robust, healthy young man of the age of 39 years and then and there had a life expectancy of 28 years and upward. That at the time of his death, he was employed by the defendant as a signalman [fol. 5] and was earning by said employment approximately $225.00 per month and that for a long time prior to and at the time of his death decedent had been, and was, supporting and maintaining his wife, Edith B. Lucus, and that he would have continued to do so during the remaining years of his life had his life not been cut short as a result of the negligence and careless of the defendant as aforesaid.

12. That the decedent was a kind, loving, generous husband, sincerely interested in the welfare of his wife. That as a result of his untimely death, said wife has been deprived of his care, comfort and society and support.

13. That as a result of his death, Edith B. Lucus has suffered injuries and damage in the amount of $75,000.00.

Second Cause of Action

For a second distinct and separate cause of action, plaintiff complains and alleges:

1. Plaintiff hereby refers to the allegations set forth in paragraph number one to eight, both numbers inclusive, of the First Cause of Action herein, and hereby incorporates said paragraph and each and every allegation therein contained in this, her second cause of action as though set forth in full herein.

2. That the defendant at the time and place of the occurrence of the grievance herein complained of hauled and per-

mitted to be hauled and used in interstate commerce and on its tracks aforesaid a car with a defective triple valve which defect permitted the triple union nut to become disconnected so as to release the air pressure from the braking system of the train in which said car was hauled so as to set the brakes of said train. That as a result of the sudden release of air pressure the brakes of said train locked and caused said train to come to an abrupt, immediate and sudden stop. And by reason of said sudden and abrupt stop the motor car upon which the deceased was riding immediately behind said train crashed into the rear end of said train causing him to suffer the grievous injuries from which [fol. 6] he then and there died as aforesaid.

3. That by reason of the failure on the part of the defendant to comply with the requirements and provisions of the Safety Appliance Act as aforesaid as herein set forth, the decedent was caused to, and did, receive the grievous personal injuries from which he then and there died.

4. That at the time of his death, caused by violation of the so-called Safety Appliance Act by the defendant as herein set forth, the decedent, William Frank Lucus, was a strong, robust, healthy young man of the age of 39 years, and then and there had a life expectancy of 28 years and upward, and at the time of his death was employed by the defendant as a signalman and was earning by said employment approximately $225.00 per month. That for a long time prior to and at the time of his death, decedent was supporting and maintaining his wife, Edith B. Lucus, that he would have continued to so support and maintain his wife during the remainder of his life had his life not been cut short as a result of the carelessness and negligence of the defendant as herein alleged.

Wherefore, plaintiff prays judgment against the defendant in the sum of Seventy-Five Thousand Dollars ($75,000.00), and for her costs herein expended and for such other and general relief as to the Court shall seem meet and equitable in the premises.

Rawlings, Wallace & Black, Edward W. Clyde.

(Duly verified.)

[fol. 7] In District Court of Weber County

Demurrer—Filed March 13, 1945

Comes now the defendant above named and demurs to the First Cause of Action contained in plaintiff's complaint, on the grounds:

First: That the allegations contained in the said First Cause of Action do not state facts sufficient to constitute a cause of action.

Second: That said First Cause of Action, and particularly paragraph 9a thereof, is indefinite and is uncertain in this, that it can not be determined from the allegations in said paragraph 9a of said First Cause of Action how or in what manner the defendant was careless and negligent in hauling and permitting to be hauled the refrigerator car in question, which refrigerator car was defective according to the allegations of said paragraph in that the threads on a triple valve thereon were worn so that the triple union nut became disconnected from the triple valve allowing the air pressure in the braking system of said train to escape and set the brakes, bringing the train to an abrupt stop.

Third: That the allegations contained in paragraph 9b of said First Cause of Action are indefinite and uncertain in this, that it cannot be determined from said paragraph how or in what manner the defendant was negligent and careless in failing to discover the defective triple valve on the aforesaid refrigerator car or how or in what manner defendant knew or could have known that said triple union nut was in a worn and defective valve and would become disconnected and cause the release of the air pressure on the braking system and bring the train to an abrupt, immediate and sudden stop.

[fol. 8] Demurring to the Second Cause of Action contained in plaintiff's complaint, defendant alleges:

First: That said Second Cause of Action does not state facts sufficient to constitute a cause of action.

Second: That from said Second Cause of Action, and particularly paragraphs 2 and 3 thereof, it cannot be determined how or in what manner the hauling and permitting to be hauled by the defendant of a car with a defective triple valve which permitted the triple union nut to become disconnected constitutes an infraction of the Safety Appliance

Act in such a way as to cover the deceased William Frank Lucus as he was operating a small motor track car upon the track of the defendant and following defendant's freight train No. 1/582 as it proceeded easterly along said track at the time of the accident complained of.

Judd, Ray, Quinney & Nebeker, Attorneys for Defendant.

Received copy of the foregoing Demurrer this 7th day of March, 1945.

Rawlings, Wallace & Black, Attorneys for Plaintiff.

[fol. 9] In District Court of Weber County

Order on Demurrers—Filed April 4, 1945

Demurrers of Defendant as to both causes of action herein having been heretofore submitted to the court and by the court taken under advisement, comes now the court and Orders that the General and Special demurrers to the First Cause of Action of Plaintiff's Complaint be, and the same are hereby, overruled; that the general demurrer to the Second Cause of Action be, and the same is hereby, overruled; and that the Special Demurrer of Defendant to Plaintiff's Second Cause of Action be, and the same is hereby, sustained, on the ground that the court is of the opinion that defendant is entitled to know the specific section or sections of the Safety Appliance Act upon which the plaintiff relies.

Dated, at Ogden, Utah, this 4th day of April, 1945.

John A. Hendricks, Judge.

[fol. 10] In District Court of Weber County

Amendment to Complaint—Filed May 2, 1945

Comes nw the plaintiff and amends paragraph two of the complaint on file herein to read as follows:

2. That this action is brought by virtue of the provisions of the so-called Federal Employers Liability Act and Safety Appliance Act, 45 U. S. C. A. 51 et seq. That

the defendant at the time and place of the occurrence of the grievance herein complained of hauled and permitted to be hauled and used in interstate commerce and on its tracks aforesaid a car with a defective triple valve which defect permitted the triple union nut to become disconnected so as to release the air pressure from the braking system of the train in which said car was hauled so as to set the brakes of said train. That the hauling of said defective refrigerator car as aforesaid was, and is, in violation of the provisions of the Federal Employers Safety Appliance Act, 45, United States Code Annotated, Sections 1 to 16, and particularly Sections 1, 8, and 9. That as a result of the sudden release of air pressure, the brakes of said train locked and caused said train to come to an abrupt, immediate and sudden stop. And by reason of said sudden and abrupt stop, the motor car upon which the deceased was riding immediately behind said train crashed into the rear end of said train causing him to suffer the grievous injuries from which he then and there died as aforesaid.

Rawlings, Wallace & Black, Clyde & Coray, Attorneys for Plaintiff.

(Duly verified.)

Received copy of the foregoing Amendment to Complaint this 1st day of May, 1945.

Judd, Ray, Quinney & Nebeker, Attorneys for Defendant.

[fol. 11] IN DISTRICT COURT OF WEBER COUNTY

DEFENDANT'S ANSWER—Filed May 11, 1945

Comes now the defendant and answering the First Cause of Action of plaintiff's Complaint as amended in paragraph 2 by plaintiff's amendment, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraphs 3, 4, 5 and 6.

2. Alleges that it has not sufficient information to enable it to form a belief as to the truth of falsity of the allegations contained in paragraphs 1, 11 and 12 of said Complaint and, therefore, defendant denies each and every allegation, matter and thing.

3. Answering the allegations in paragraph 7, defendant denies that decedent, in the usual and ordinary course of his employment, was required to travel by means of a small motor track car upon the aforesaid main line track of defendant from the station at Lemay, Utah, toward the station known as Newfoundland station in Box Elder County, Utah.

Further answering the allegations contained in said paragraph, defendant admits said other allegations in said paragraph contained.

4. Answering the allegations contained in paragraph 8 of said complaint, defendant denies that said train made an abrupt emergency stop immediately in front of the motor car in which the deceased was riding and that the motor car following said freight train crashed into the rear end of said freight train.

Answering the other allegations contained in said paragraph 8, defendant admits said other allegations.

5. Denies each and every allegation, matter and thing contained in paragraph 2 as amended and paragraphs 9, 10 and 13 of plaintiff's First Cause of Action.

[fol. 12] 6. Further answering said First Cause of Action, defendant denies each and every allegation, matter and thing in said First Cause of Action contained not hereinbefore admitted, modified or denied.

Answer to Second Cause of Action contained in said complaint:

1. Answering the allegations contained in paragraphs 1 to 8, inclusive, as set out in paragraph 1 of plaintiff's Second Cause of Action by reference, this defendant admits and denies said allegations as in its answer to plaintiff's First Cause of Action set out, which said part of its answer by reference is made a part of its answer to plaintiff's Second Cause of Action as though set out in full.

2. Alleges that defendant has not sufficient information to enable it to form a belief as to the truth or falsity of the allegations contained in paragraph 4 of plaintiff's Second Cause of Action and, therefore, defendant denies each and every allegation, matter and thing in said paragraph 4 contained.

3. Denies each and every allegation, matter and thing contained in paragraphs 2 and 3 of plaintiff's Second Cause of Action.

4. Further answering said Second Cause of Action, defendant denies each and every allegation, matter and thing in said paragraph contained not hereinbefore admitted, modified or denied.

5. Further answering said Complaint and as its separate and additional defense thereto, this defendant alleges that the accident to plaintiff's decedent was caused by the said William Frank Lucus' own negligent acts, conduct and omissions.

6. Further answering said complaint and as its separate and additional defense thereto, this defendant alleges that the accident to plaintiff's decedent was proximately contributed to by said William Frank Lucus' own negligent acts, conduct and omissions.

[fol. 13] Wherefore, having fully answered, defendant prays that plaintiff take nothing by his Complaint herein and that it be dismissed hence and have and recover its costs.

Judd, Ray, Quinney & Nebeker, Attorneys for Defendant.

(Duly verified.)

Received copy of the foregoing Answer this 10th day of May, 1945.

Rawlings, Wallace & Black, Edward Clyde, Attorneys for Plaintiff.

[fol. 14] In District Court of Weber County

Defendant's Motion for Directed Verdict—April 5, 1946

Comes now the Defendant, Southern Pacific Company, after each of the parties have rested, and moves the Court for an order directing the jury to return its verdict in favor of the defendant and against the plaintiff, no cause of action, for the following reasons and upon the following grounds:

First: That there is no evidence in the record which would justify a finding by the jury that anything done or

omitted by the defendant caused or contributed proximately to the injury and death of William Frank Lucus.

Second: The evidence establishes, without conflict and as a matter of law, that the sole proximate cause of the death was the inattentive and careless manner in which Lucus drove and operated the motor car in question.

Third: Upon all of the record it is established, as a matter of law, that Edith Naomi Lucus had no reasonable expectation of receiving any financial aid from William Frank Lucus if he had continued to live.

Fourth: It appears, as a matter of law, that the disconnection of the triple union nut from the triple valve was not a contributing cause or the cause of the collision at the rear end of the train, and, further, that the Safety Appliance Act in question was not passed for the purpose of furnishing protection to one in the situation in which Frank Lucus was employed and engaged at the time of the rear-end collision.

Fifth: And, on the further ground, that it appears as a matter of law, from the testimony in the case, that there was not a defect within the meaning of the Safety Appliance Act under the facts and circumstances shown by the testi-[fol. 15] mony, but that, on the contrary, it appears without dispute that all of the cars in the train were equipped with good and efficient brake and that they operated in the manner intended, and that when there was a leaking of the air in the air-line, by reason of the disconnection of the triple union nut, that the brakes did exactly what they were supposed to do and intended to do; they stopped the train in an emergency, and that the stop was exactly the same type of stop that would have been made by an emergency application of the air by the engineer.

Judd, Ray, Quinney & Nebeker, Attorneys for Defendant.

[fol. 16] In District Court of Weber County

Trial Court's Ruling on Motion for Directed Verdict—April 6, 1946

At this time the Court grants the Defendant's Motion for a directed verdict,—and, Gentlemen of the Jury, you are hereby directed by the Court to return a verdict of No Cause of Action.

If you go into the jury room you will elect one of your number foreman, and return the verdict. The Clerk, I suppose, inasmuch as there is no bailiff, should conduct the jury to the jury-room. And this is the form of verdict.

(Jury go to jury-room.)

It is the opinion of the Court that Mr. Lucus—one who was in the position he was in at the time of the accident, the Act didn't apply to him.

Mr. Black: Is that the ground of the granting of the motion for a directed verdict, that the Act didn't apply to Mr. Lucus?

The Court: Yes,—that the Act didn't apply to Mr. Lucus.

[fol. 17] In District Court of Weber County

Judgment on Verdict in Open Court—Filed April 6, 1946

This action came on regularly for trial. The said parties appeared by their attorneys, Parnell Black, Esq., and Howard Coray, Esq., counsel for plaintiff and Paul Ray, Esq., and A. H. Nebeker, Esq., counsel for defendant. A jury of eight persons was regularly empaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names, and on their oath say: "We, the jury empaneled in the above entitled action, find the issue joined in favor of the defendant and against the plaintiff, Howard

F. Coray, Ancillary Administrator of the Estate of William Frank Lucas, deceased. No cause for action.

Samuel J. Grix, Foreman; G. F. Thorstensen, Elias Peterson, Melvin T. Phillips, Samuel Hadley, Jr., Elmer H. Penman, Thomas F. McFarland, Lawrence W. Hansen."

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that the said defendant do have and recover of and from the plaintiff, its costs and disbursements incurred in this action amounting to the sum of

Judgment recorded the 6th day of April, A. D. 1946.

Lawrence M. Malan, Clerk, by Agnes S. Crites, Deputy. (Seal.)

[fol. 18] In District Court of Weber County

Motion for New Trial—Filed June 15, 1946

To the Above Named Defendant and to Its Attorneys, Ray, Quinney, Nebeker and Bowen:

Comes Now the plaintiff, above named, and moves the Court to vacate and set aside its Judgment made and entered on the directed verdict of the jury in the above entitled matter on the following grounds:

1. Irregularity in the proceedings of the Court or adverse party, or any order of the Court, or abuse of discretion by which the plaintiff was prevented from having a fair trial.

2. Accident or surprise, which ordinary prudence could not have guarded against.

3. That the judgment is against law.

4. Error in law occurring at the trial and duly excepted to by the plaintiff.

Said Motion will be made and based upon the minutes of the Court, the records, files and papers on file in said action and on the evidence adduced at said trial.

Dated, at Salt Lake City, Utah, this 12th day of June, A. D. 1946.

Rawlings, Wallace & Black, Clyde & Coray, Attorneys for Plaintiff.

[fol. 19] IN DISTRICT COURT OF WEBER COUNTY

MINUTE ENTRY OF RULING ON PLAINTIFF'S MOTION FOR NEW TRIAL—Filed July 1, 1946

Herein comes on to be heard plaintiff's motion for new trial; counsel for respective parties not appearing. Whereupon, said motion is by the court denied.

John A. Hendricks, Judge.

Ordered Entered July 1st, 1946.

[fol. 20] IN DISTRICT COURT OF WEBER COUNTY

NOTICE OF APPEAL—Filed July 6, 1946

To the Above Named Defendant, Southern Pacific Company, a Corporation, and to Ray, Quinney, Nebeker and Bowen, its attorneys:

You and each of you will please take notice that the plaintiff in the above entitled action hereby appeals to the Supreme Court of the State of Utah from the judgment rendered in said District Court on the 6th day of April, 1946, in favor of said defendant and against the plaintiff, said judgment having been made and entered on the verdict of the jury of no cause of action, which said verdict was rendered by the jury upon the order and direction of the Court.

Dated, this 2nd day of July, A. D. 1946.

Rawlings, Wallace & Black, Clyde and Coray, Attorneys for Plaintiff.

Service of the foregoing Notice of Appeal and a true copy thereof is hereby acknowledged this 3rd day of July, A. D. 1946.

Ray, Quinney & Nebeker, Attorneys for Defendant, Kearns Building, Salt Lake City, Utah.

[fol. 21] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 22] IN DISTRICT COURT OF WEBER COUNTY

Portions of the Bill of Exceptions

APPEARANCES:

For Plaintiff: Parnell Black, Esq., of Messrs. Rawlings, Wallace & Black, and Howard F. Coray, Esq., of Messrs. Clyde & Coray.

For Defendant: Paul H. Ray, Esq., and A. H. Nebeker, Esq., of Messrs. Judd, Ray, Quinney & Nebeker.

This cause came on regularly for trial at ten o'clock a.m., Thursday, April 4, 1946, before the Honorable John A. Hendricks, one of the Judges of the above-entitled court, sitting at Ogden, Weber County, Utah, with a jury, the above-named counsel appearing for the respective parties; whereupon the following proceedings were had:

JAMES H. TURNER was duly sworn as a witness in the case and testified as follows:

Direct examination.

By Mr. Black:

Q. You may state your name and address, please.

A. James H. Turner, 4301 Anderson Ave., Oakland, California.

Q. You are employed by the Southern Pacific Company, are you not?

A. Yes, sir. Twenty years for them, to be exact.

Q. In what capacity?

A. Claims adjuster. Claim agent at the present time.

Q. And you have been connected with that department for that 20 years?

A. Yes, sir.

Q. We will consider the map that I hold in my hand as having been marked "Plaintiff's Exhibit A"——

A. Yes, sir.

[fol. 23] Mr. Black: And your Honor sees that the map is a little bit long, so far as our part is concerned. I will ask the witness to tell the jury whether or not he recognizes the map?

A. It was one that was prepared at my direction.

Q. And prepared, I take it, by the engineering department of the Southern Pacific Company?

A. That is right, sir.

Q. And was prepared, I take it, in connection with this investigation that is now being carried on before the jury?

A. That is right. This map is a standard right-of-way map. They are always available, but they took this particular print from one.

Q. At least it was produced by the engineering department?

A. That is right.

Q. It is drawn and constructed on a definite scale, is it not?

A. Yes, sir.

Q. What scale?

A. One inch equals 400 feet on the ground.

Q. One inch equals 400 feet. I will ask you to state whether or not the other end of the map, there, shows the little station of Lemay?

A. It does. It is marked.

Q. Lemay is within the State of Utah, is it not?

A. I believe so.

Q. Some distance west from Ogden?

A. That is right.

Q. Do you know the approximate distance between Lemay and Newfoundland?

A. It is approximately 4 miles, I believe.

Q. The top of the map I take it is north?

A. That is right.

Q. And the part that you have over towards you is the west?

A. That is true.

[fol. 24] Q. The part I have is east, and the bottom is south?

A. That is right.

Q. Mr. Turner, I will ask you whether or not the map shows the north switch at Lemay?

A. The north switch, or the east switch? This is the east switch.

Q. Well, the east switch. What do you call these two railroad tracks?

A. The north siding and the main line.

Q. The two tracks at Lemay, the north siding and the main line?

A. Yes. And then there are some other tracks west of the station.

Q. When you speak of the east switch at Lemay you speak of the switch that connects the north siding with the main line?

A. Yes, sir.

Q. Will you point that out to the jury?

A. Yes.

Q. That is indicated on the map, is it not, as R.S. 142-26 plus 443.—Now, Mr. Turner, do you know approximately how far it is from the station at Lemay to the East switch?

A. Well, I would say roughly about a mile and a quarter or a mile and a half perhaps.

Q. If the jury were interested in it they could take a ruler and scale it off, and every inch would be 400 feet?

A. That is right.

Q. You may state whether or not there was a semaphore light at the east switch at Lemay on the 25th of May, 1944?

A. Yes, sir, there was, and it is indicated on the map by a diagram on the map. In fact, there are two; one governing eastbound movement and the other governing westbound movement.

Q. Will you describe those semaphores to the jury?

A. I think every one in the jury are familiar with the semaphore signals; but they are on a standard possibly 12 or 14 or 16 feet high. I never measured one. The standard has a cross-arm. When the cross-arm is in this position, it is a stop-sign, and the other way it is clear. One light is red and the other green.

[fol. 25] Q. When the semaphore is in the stop position the arm will be at the 90° angle?

A. That is right.

Q. And the light will be red?

A. And the light will be red.

Q. Will you tell the jury how those semaphores are operated, please?

A. I am not an expert. They are operated by track circuits and batteries. When the train approaches a certain point going over that particular territory, some farther than others, when they hit this particular point and the track ahead is clear the signal will light up with the

arm in the down position, indicating a clear track. However, if the track is occupied, that signal will be up, and will stay up until the track is clear.

Q. So, having in mind two signals at Lemay, at the east switch-point; supposing Passenger Train 28 is approaching that signal from the west, traveling east——

A. Yes, sir.

Q. Will you tell the jury what effect that train would have on either one of these signals as the train approached?

A. Assuming that the track is clear ahead of 28, the light would be green, with the arm in a lowered position, indicating a clear track.

Q. Yes.

A. However, if there were a train ahead of it, that light would be red, and the arm would be up, at a 90° angle.

Q. What would be necessary so that the position of the signal would change?

A. As soon as the rear end of No. 28 cleared the insulated joint at this signal, that signal arm would then go up into the stop position, and would be held in the stop position—I assume these are overlapping signals—until he got at least two signals ahead, and then the arm would drop and it would go to the clear part.

[fol. 26] And that would clear the track for other trains approaching in the same direction?

A. Yes; that is the general idea.

Q. Have you been advised as to the approximate point of the collision which occurred on the 24th day of May, 1944, between one of the Southern Pacific Company's freight trains and the track car Mr. Lynch and Mr. Lucus were riding upon?

A. I understand it happened somewhere in the vicinity of mile post 704.

Q. West of this signal?

A. That is my recollection of it.

Q. Will you point out to the jury mile post 704?

A. Yes.

Mr. Black: Do you all see it?

A. It is labeled "704."

Q. Will you tell the jury approximately how far mile post 704 is eastward from the east switch at Lemay?

A. We scaled that off and found it was 3600 feet.

Mr. Black: We offer in evidence the exhibit.
The Court: It may be received.

Cross-examination.

By Mr. Nebeker:

Q. I understood you to tell Mr. Black that if there were a freight train ahead of the train that you designate as No. 28, that there would be certain blocks between the rear of the freight train and the approaching No. 28 which would indicate to the approaching train that it should stop before it entered into the block in which the freight train was proceeding?

A. That is right.

Q. Do you have any judgment or information which would enable you to tell us how many blocks there would be between the rear of the First 587 and the approaching No. 28?

[fol. 27] A. Well, my understanding is that there would be two signals to the rear of the freight train, indicating a stop position.

Q. And that would be an order to the approaching No. 28 to stop before it entered those blocks?

A. Yes, to stop and then proceed with caution, I believe, to the next signal.

Q. The arm then would be in a horizontal position, as you have indicated?

A. That is right.

Q. And the light on that signal would be red?

A. Correct.

Q. Can you tell us from the map, or do you know from your knowledge of the situation and location at the time, approximately how many miles it would be between the rear end of First 587 and approaching No. 28, assuming it didn't run into any red block and assuming that he followed orders and instructions?

A. It would be two signal blocks. I imagine that would be pretty close to a mile; may be two miles. I don't know. I am not very familiar with that territory out there. I have been over it many times, but——

Mr. Nebeker: I think that is all.

Redirect examination.

By Mr. Black:

Q. In other words, Mr. Turner, those blocks have at least one purpose, and that is the protection of the rear end of the preceding train?

A. That is right.

Q. So that the preceding train is protected by at least two blocks to its rear?

A. Yes.

Q. When you say that it was just plain red, it would be that the arm was straight out and the lights red?

[fol. 28] A. Yes, lights red.

Mr. Black: That is all.—Mr. Jorgensen, will you come forward, please?

Darrel E. Jorgensen was duly sworn as a witness in the case and testified as follows:

Direct examination.

By Mr. Black:

Q. Will you state your name, please?

A. Darrel E. Jorgensen.

Q. And you reside, do you not, here in Ogden?

A. Yes, sir.

Q. What is your address, please?

A. 1149 Porter Avenue.

Q. You are employed, are you not, by the Southern Pacific Company?

A. Yes, sir.

Q. And have been for a number of years?

A. Yes, sir.

Q. What has been the nature of your employment during the years you worked for this company?

A. As a railroad trainman, brakeman, and conductor.

Q. When did you commence your employment as a brakeman?

A. August 6, 1924.

Q. When were you promoted?

A. October, 1942.

Q. And since October, 1942, have you been employed as a conductor?

A. Yes, sir.

Q. And have you been in the freight service during that time?

A. Yes, sir.

Q. Are you still a conductor and are you still in the freight service?

A. I am now, yes.

Q. You were in the service, were you not, on First 382 on the 24th of May, 1944, at the time of this accident that cost [fol. 29] the life of Mr. Lucus?

A. Yes, sir.

Q. I believe at that time your train was eastbound, coming into Ogden?

A. Yes, sir.

Q. At the time of the accident you may state whether or not you and your crew were in charge of the train?

A. Yes, sir, they were.

Q. Who were the members of your train crew at that time?

A. Lawrence Lee-Thomas was the flagman and B. C. Preece—and I don't know whether the head brakeman at that time was Noffsinger or not.

Q. At that time one crew in the caboose were deadheading, were they not?

A. Yes, sir.

Q. Will you tell us the names and positions of that crew?

A. It was Conductor E. L. Anderson, and the brakemen were Frank Agricola, Mark Bowers, and Leland Law, I think it is.

Q. And the time had just about arrived that you were going to take the train over, had it not?

A. Yes, sir.

Q. Will you state whether or not you received any train orders as you passed Lemay?

A. Yes; we received train orders at Lemay.

Q. Will you tell the jury what those orders were regarding?

A. I don't remember what was in those orders, but it was time for us to make a point east of Newfoundland, for Fifth 87, and at that point we were going to let the train behind us by us.

Q. Train No. 28 was the eastbound passenger train, was it not?

A. Yes, sir.

Q. What kind of train was Fifth 87?

A. That was a passenger train westbound.

Q. Both of those trains were going to pass you at Groome?

[fol. 30] A. Yes, if we could get there in the time we had.

Q. State whether or not the train you were operating was brought to a full stop at Lemay?

A. It was.

Q. Do you recall passing the east switchpoints of Lemay, as the train proceeded eastward?

A. We were on the south siding at Lemay.

Q. On the south siding?

A. Yes, sir. We had been in the sidetrack there and we were making a run for Groome.

Q. What do you mean by "making a run"?

A. Well, we were going to Groome for these two passenger trains.

Q. There are two sidings, are there not, at Lemay?

A. Yes, sir.

Q. South siding and the north siding?

A. Yes, sir.

Q. And the main line track goes between them?

A. That is correct.

Q. You passed at Lemay on the south siding?

A. Yes, sir.

Q. You may state whether or not an accident occurred which as far as your train was concerned there was an accident to 582 as you were moving eastward from Lemay?

A. Yes; at a point midway between Lemay and Newfoundland the train came to an emergency stop.

Q. What do you mean by "an emergency stop"?

A. Well, in this particular case the branch pipe came loose, or was knocked off of the auxiliary reservoir, or triple valve, and brought the train to a stop—applied the brakes in emergency.

Q. How long a train did you have at that time?

A. About 80 cars, if I remember correctly.

[fol. 31] Q. This stop, as I understand it, was an undesired stop?

A. Yes, sir.

Q. And was caused by the failure of this triple valve?

A. Yes, sir.

Q. Where were you at the time the train came to a stop?

A. I was in the caboose.

Q. At that time there were some other men in the caboose, were there not?

A. Yes, sir.

Q. Will you tell the jury which men were in the caboose besides yourself?

A. There was Conductor Anderson and his crew and myself.

Q. Conductor Anderson, Mr. Agricola, Mr. Law, and Mr. Bowers, and yourself?

A. Yes, sir.

Q. Immediately prior to the time the train stopped what were you doing, Mr. Jorgensen?

A. I was reading the train orders I had received at Lemay, and checking them.

Q. Reading the train orders?

A. Yes.

Q. What did you do immediately after the train stopped?

A. Well, I at first thought maybe the engineer found out he couldn't make it—couldn't get to Newfoundland for these passenger trains, and then I looked up and saw that we didn't have any air in the caboose gauge, and then I turned to the back of the train, and saw this motor car coming. And Anderson said, "Good God, Swede—those guys aren't going to get stopped." And we went out to the back and tried to stop them.

Q. While you were looking toward the air gauge, where was Conductor Anderson?

A. He was in the caboose, looking at the orders. We were checking the orders, because he was going to assume duty, and we were looking over them.

[fol. 32] Q. What was it he said to you?

A. He said, "Good God, Swede, look; these guys aren't going to get stopped," or something to that effect.

Q. Were you at the rear end of the caboose at that time?

A. We were in the middle of the caboose, the center of the caboose.

Q. Did you step to the rear end?

A. Yes. We went there, and told them, and tried to stop them, and I stepped down on the step of the caboose and tried to stop them, but we couldn't get them to turn their heads.

Q. How far away from the rear end of the caboose was the track car when you saw it?

A. I believe in the neighborhood of ten car-lengths—about 500 feet.

Q. Did you form any conclusion as to the speed of the track car?

A. I imagine it was making the speed of the train or better, around 35 miles an hour.

Q. Were you able to reach the ground before the collision took place?

A. I was going to step onto the ground, and then I stepped back onto the caboose, and I was on the caboose when the motor car hit the train.

Q. The train of course was to a stop at that time?

A. Yes, sir.

Q. What happened to the men that were on the track car?

A. Well, Mr. Lucus was thrown clear of the track, to the north of the track, and the other man, Lynch, was thrown to the south side of the track.

Q. Did you pick the men up?

A. Yes. I looked at Mr. Lucus, and I could see that—it looked to me like he couldn't live. His neck had been hurt. And the other man was groaning. So we got the stretcher and put the other man on the caboose, and then we picked up Mr. Lucus.

[fol. 33] Q. Was Mr. Lucus dead at that time?

A. I judged he was dead, yes.

Q. Now, when you observed this track car approaching the rear end of your train will you describe to the jury the position the men were in on the car?

A. One was sitting on one side of the car and the other on the other, and they were looking back towards Lemay.

Q. Back towards Lemay?

A. Yes, sir—west, in a westerly direction.

Q. Of course when you pulled out of Lemay you had no intention to stop that train short of Newfoundland under any circumstances, had you?

A. No.

Q. After the accident you may state whether or not you made any investigation of the train?

A. After the accident I was concerned mainly with getting the train in the clear for these two passenger trains and getting these men on "28" and sending them to Ogden, and Conductor Anderson was to relieve me and I was

about "dead" on this 16-hour law, and he said he would inspect for this defect and make the report on it for me.

Q. So that you never did determine where the difficulty was?

A. No, sir.

Q. You did, however, make the required report, did you not?

A. Yes, sir.

Q. You may state whether or not the report was required as a part of your duties?

A. Yes, sir.

Q. I show you, Mr. Jorgensen, a document here which seems to be a carbon copy, marked for identification as Plaintiff's Exhibit B. Will you examine it and tell the jury whether or not you recognize it?

[fol. 34] A. Yes, sir.

Q. Your answer is "yes, sir"?

A. Yes, sir.

Q. This is a report made by you, is it not?

A. Yes, sir.

Q. In your hand-writing?

A. Yes, sir.

Q. And it was made in connection with this occurrence we have been talking about?

A. Yes.

Mr. Black: We offer it in evidence, the exhibit.

Mr. Ray: While I think there is no dispute between Counsel and our side as to what occurred, subject to our saving in the record our objection as to the materiality, we have no objection to having the facts shown. It seems to appear, however, with respect to Exhibit B, that Mr. Jorgensen didn't actually make the inspection; that it was made for him by some one else, and the statement on Exhibit B would undoubtedly be hearsay under the circumstances.

Mr. Black: We don't claim that the recitation with respect to the cause of the stoppage of the train is accurate, but we will place accurate information in the record later.

The Court: With that understanding, it may be received in evidence.

Q. Mr. Jorgensen, I call your attention here to the recitation with respect to the car in which the difficulty existed, P. F. E. 29435. You did have such a car in the train?

A. Yes. If I have it on there, that was the car.

Q. You say it was the sixtieth car from the head end, and that would be about accurate, would it not?

A. Yes, sir.

Q. At the time the train was stopped as a result of the emergency application of the brake power, how fast was it going, about?

A. Oh, I would imagine between 25 and 30 miles an hour.

[fol. 35] Q. Were you paying any particular attention to the speed of the train at that time?

A. No; only that we were just making speed from leaving the sidetrack, and I imagine we were making that speed.

Q. Mr. Jorgensen, during the many years you have worked as a brakeman and conductor I suppose you have witnessed many occasions where the trains were stopped by emergency application of the air-brakes?

A. Yes, sir.

Q. You may state whether or not these brakes were set at emergency any time the air pressure is released in the air line through the train—May be I don't make myself clear: Having a train 82 cars in length, and something happens to break the air line in the middle of the train, will that set the brakes at emergency?

A. Yes, sir.

Q. And how will the brakes be set; in what order?

A. Well, they will—with this new equipment A-B it will almost set them automatically throughout the train.

Q. The air-brakes in every car will be set at almost the same time?

A. Yes.

Q. If I understand it, the braking power will run immediately from both directions?

A. Yes, sir.

Q. In both directions from the point of the break?

A. Yes, sir, as I understand it.

Q. What kind of equipment did you have on this train?

A. Well, it was mixed equipment,—"A-B" triple and what they call the "K" triple.

Q. Both?

A. Yes, sir.

[fol. 36] Q. Having in mind this train you were then moving, and having in mind that the air-pressure was released in a car, the 60th toward the rear from the head end, you may state whether or not that would cause the air-brakes

to be set almost the same time throughout the length of the train?

A. If I understand your question correctly, it would.

Q. In other words, within the course of a second or two you would have the brakes set on all the cars in the train?

A. Yes, sir.

Q. By the way, these air-brakes are set by the release of the air-pressure, are they not, and released by the building up of the pressure?

A. They are released by the building up of the pressure, yes, sir.

Q. And if the pressure is suddenly released by the escape of the air, that sets the brakes?

A. Yes, sir.

Q. What happens to the air-brakes on a train if the train breaks in two while it is in movement?

A. If the train breaks in two?

Q. Yes.

A. It automatically sets the brakes.

Q. What would happen if the triple union would become disconnected from the triple-valve and allow the air to escape to the atmosphere?

A. Well, that would set the brakes.

Q. And that is what happened on this occasion, was it?

A. Yes, sir.

Mr. Black: That is all; thanks.

Cross-examination.

By Mr. Nebeker:

Q. Mr. Jorgensen, do you recall that as you entered the mainline track leaving Lemay at the east end of the siding, that you didn't have to stop your train to have anybody close the switch?

[fol. 37] A. Yes, sir.

Q. That was done by somebody who remained at Lemay?

A. Yes, sir.

Q. Did you see the motor car crew as you passed them at the east end of the south track?

A. No, I don't recall seeing them there.

Q. You never saw them at any time before the time you have mentioned to Mr. Black, when they were about ten car lengths back of the caboose?

A. I remember seeing the motor car come onto the main line after we had gone onto the main line.

Q. And that was after you had passed the switchpoints?

A. Yes, sir.

Q. Do you know whether or not they had to lift their motor car over onto the main line?

A. I didn't see them lift it on there.

Q. You didn't see them lift it on?

A. No.

Q. It would have to be far enough from the main line to pass outside of what would be called the fouling point, in order not to interfere with your train or for your train not to hit it, wouldn't it?

A. Yes, sir.

Q. How far back would that have to be from the switchpoints—would that have to be, approximately; that is, how far back would the motor car be set from the main line, on the siding?

A. I imagine it would have to be 4 or 5 feet away from the main line, anyway; so that they would keep away from getting hit.

Q. When you last saw it it had been put onto the main line, or was it still on the siding?

A. When I saw the motor car first it was on the main line and they were following us.

Q. And that was after you had passed the switchpoints?

[fol. 38] A. Yes, sir.

Q. Do you recall making a statement, Mr. Jorgensen, at Ogden, on May 25, 1944?

A. Yes, sir.

Q. About this accident?

A. Yes.

Q. And that statement was read to you yesterday by me?

A. Yes, sir.

Q. And we discussed the case?

A. Yes, sir.

Q. Do you remember describing the stopping of the train on which you were the conductor, as a sudden but easy stop?

A. Well, there wasn't any jerk on the caboose, but it come to a sudden stop. There wasn't any jerk so far as the caboose was concerned.

Q. In that type of stop, with the cars that you had in that train, tell us whether or not in your judgment, if the

wheels continue to roll rather than slide until the time the train stops?

A. They do roll until they come to a stop; they don't slide.

Q. They do roll until they come to a stop?

A. Yes.

Q. Can you tell us whether you had loads, or empties, in your train?

A. If I remember correctly, they were loads.

Q. Would you want to tell us how much tonnage, about, in thousands, you had?

A. Approximately we had 80 cars—around 8,000 M's.

Q. And by "M's" what do you mean?

A. Thousand pounds.

Q. So that it is accurate to say that you had 82600?

A. Yes, sir.

Q. I understand you were reading train orders when the train brakes went into an emergency?

[fol. 39] A. Yes, sir.

Q. Would that require you to be sitting down, as you remember, at your table?

A. I think probably I was sitting down, but I don't remember.

Q. So that the jury will have a picture of this.—Most of us surely have been on cabooses. People that have hauled livestock have been on them.— The car has a table and chair near the front end, where the conductor's station is; is that right?

A. In this caboose it was near the center of the caboose.

Q. It was near the center?

A. Yes, sir.

Q. And then was there a compartment there, with a table in it, where these dead-head boys were playing cards, or do you remember that?

A. I don't remember what they were doing. There was a table there in the caboose, all right.

Q. Another table, other than the one you were using?

A. Yes, sir.

Q. And as you sat at your table with your papers you would be facing the head end of the train, would you; or do you recall that?

A. No; I would be facing the side of the train, where I could look out of the window.

Q. Look out the south side?

A. Yes, sir.

Q. You had already determined, before you saw the train stop, that you had time to get to Groome for this approaching passenger train; didn't you?

A. Yes, sir.

Q. Do you know how far Groome is from Newfoundland?

A. I think it is about ten miles, if I remember correctly.

Q. After the stop did you speak to Conductor Anderson?

A. After the stop?

Q. Yes.

[fol. 40] A. I probably did.

Q. Let me refresh your recollection and ask you if you said to him in substance—if you said to Mr. Anderson, as you now remember: "I wonder if he is going in at Newfoundland or if he hit some one"?

A. I made that statement, I remember, yes, sir.

Q. Did Mr. Anderson make some answer to you, or do you know?

Mr. Black: Answer yes or no.

A. Well, he probably did; but I don't know what it was.

Q. Do you remember after the train stopped, looking at the "air"?

A. Yes.

Q. There is an air-gauge there in the caboose?

A. There is. That is the first thing I done after the train stopped.

Q. Did you make some statement then about the air being all gone?

A. Yes. I said, "We have stopped in an emergency, the air is gone."

Q. And then did you make a statement to Anderson or somebody in the car that, "I don't think we broke in two, because he made an easy stop; he must have stopped with the air"?

A. Yes, sir.

Q. You made that statement, or something similar to that, in substance or effect?

A. Yes.

Q. Now, was Conductor Anderson right there close to you?

A. Yes, sir.

Q. And after you made this statement and looked at the "air", someone then made a statement to you about these men coming?

A. No—we looked to the rear of the train and saw them coming, and then Anderson said to me; he said: "Good God, Swede, these men aren't going to get stopped," or something to that effect, anyway.

[fol. 41] Q. Did he say, in substance or effect, "Good God, look coming there"?

A. Yes.

Q. That is about what was said?

A. Yes.

Q. And then you went to the rear, and observed that they were approaching?

A. Yes, sir.

Q. And each of them was looking toward the west?

A. Yes, sir.

Q. Was there any decrease in the speed of the motor car between the time when you first saw it and when it hit the train?

A. No, sir.

Q. Did either one of the men turn his head toward the east?

A. No, sir.

Q. As I understood your testimony, Mr. Lucus was sitting on the north side of the motor car?

A. Yes, sir.

Q. That is, his body would be facing north?

A. He was sitting on the north side of the motor car, but his body was facing west when they hit.

Q. Was he turned clear around so that his entire body was to the west?

A. Yes.

Q. There is some kind of a seat on there that permits a man to sit what you call sideways, or, if he sat normally on the seat I presume his head and his body would be facing north, if he was on the north side of the motor car?

A. Well, I haven't paid much attention to that.

Q. What was the position of the man on the south side of the motor car?

A. Oh, he was turned looking to the west.

[fol. 42] Q. Was his body turned to the west, as well as his head?

A. Well, his shoulders were turned to the west. Their backs were towards the train.

Q. Their backs were toward the train?

A. Yes, sir.

Q. You say that you have been on trains many times when emergency stops have been made?

A. Yes, sir.

Q. And of course an emergency stop can be made at any time, for a great variety of reasons?

A. Yes, sir.

Q. And if a break occurs in the air-line or pipes, the purpose of the air-brakes is to stop the train immediately, is it not?

A. Yes, sir.

Q. And the same thing can be done by the engineer in the engine putting the brake lever "in emergency"?

A. Yes, sir.

Q. Is that what you call "big-holing her"?

A. Yes, sir.

Q. And that is a rather common thing in railroading, for the engineer to "big-hole her"?

A. Well, they do it very often if there is any emergency arises.

Mr. Nebeker: That is all.

Re-direct examination.

By Mr. Black:

Q. Mr. Jorgensen, Conductor Anderson is in San Francisco at this time, is he not?

A. Yes, sir.

Q. And has been there for some time?

A. Yes, sir.

Q. Were you on the rear of the caboose of your train at the time you saw this motor car placed on the main-line tracks?

A. Leaving Lemay?

[fol. 43] Q. Yes.

A. Yes, sir. I didn't see them place it on, but I was on the rear of the caboose and I saw that motor car on the main line.

Q. At the time you did see it on the main line you were out at the rear of the caboose?

A. Yes.

Q. And you were looking toward the west, I presume?

A. Yes, sir.

Q. Now, that air-gauge in the caboose—will you tell the jury where it is and how much attention it requires to determine whether the air is in or out of it?

A. Well, the air-gauge in this particular caboose was in the cupola, and it is in about the middle of the cupola, and it is about eight feet off the floor, and it is at a point where you can see it from your desk.

Q. All it required was just a glance up, wasn't it?

A. Yes, sir.

Q. You didn't have to get up there and make a close examination?

A. No, sir.

Q. How long did it take you to determine that there was no air in that train?

A. Just a matter of seconds, I suppose.

Q. Just a matter of a glance, wasn't it?

A. Yes, sir.

Q. When, with respect to the time that the train started to stop, was it that you glanced at the air-gauge?

A. Well, immediately after it stopped I looked at the air-gauge.

Q. While the train was rolling to a stop did you look at the air-gauge?

A. No I don't think I did.

Q. As soon as you looked at the air-gauge you knew it had not been a service application, because of the abruptness with which the train stopped, didn't you?

[fol. 44] A. Yes, sir.

Mr. Black: That is all.

Recross-examination.

By Mr. Nebeker:

Q. What was the condition of the weather that afternoon, Mr. Jorgensen?

A. Well, the sun was shining and it was clear, calm.

Q. What kind of a track was that?

A. Well, it is a straight track.

Q. Level?

A. Level.

Q. Many miles across there, straight and level?

A. Yes, sir.

Q. That is the area that you commonly speak of as the West Desert, isn't it?

A. Yes, sir.

Q. Looks like a lake bottom from which the lake has receded?

A. Yes, sir.

Q. Hard to find a more-level piece of country?

A. Yes, sir.

By Mr. Black:

Q. When you first saw this car approaching; that is, after the train stopped, did you notice whether or not Mr. Lucus and Mr. Lynch were doing anything except just looking toward the west?

A. They were looking towards the west.

Q. Were they doing anything else?

A. Not that I could see.

Mr. Black: May it be stipulated that Train First 582 came to an emergency stop at the time and place described by Mr. Jorgensen because the triple union nut became disconnected from the triple-valve on Car P.F.E. 29435, due to threads on triple-valve being worn?

Mr. Ray: We will stipulate that the train stopped at the point described by Conductor Jorgensen; that it was stand-[fol. 45] ing there when the collision occurred. And then, subject to our objection that it is immaterial why the train stopped, we will admit that it stopped because the triple union nut became disconnected from the triple-valve on Car P.F.E. 29435, due to the threads on the triple-valve being worn.

Mr. Black: And that as a result of the triple union nut becoming disconnected from the triple-valve it permitted the air to escape from the air-line and set the brakes in emergency?

Mr. Ray: Subject to our objection, yes.

Mr. Nebeker: Will you stipulate that the P.F.E. car in question was inspected on May 24, 1944, at Carlin, Nevada, —given the usual train running inspection, and that the inspection made by the Company at that time, which was a reasonable inspection, did not disclose that the triple union nut was loose and that if the nut had been loose at that time or at any time prior to the time the accident happened, the train would have stopped because of the loss of the air?

Mr. Black: I will so stipulate, subject to the reserved objection to the stipulated testimony, on the ground it is incompetent, irrelevant and immaterial.

Now, your Honor, in Exhibit B, which has been heretofore received, it is stated here, it says the train stopped in emergency account broken branch pipe, and this stipulation is to take the place of this recitation, because we find now that the recitation in "B" is not accurate, but that the stipulation is, as we understand it.

Mr. Nebeker: Correct.

LELAND LAW was duly sworn as a witness in the case and testified as follows:

Direct examination.

By Mr. Black:

Q. Will you state your name and address?

A. Leland Law, 477 West 12th Street, Ogden, Utah.

[fol. 46] Q. You are employed, are you not, Mr. Law, by the Southern Pacific Company?

A. Yes, sir.

Q. In what capacity?

A. Brakeman.

Q. For how many years have you been so employed?

A. Three years now.

Q. And you were employed as brakeman by this company on the 24th of May, 1944?

A. Yes, sir.

Q. And I believe at that time you were dead-heading, as they call it, on First 582, as it proceeded eastward from Lemay?

A. Yes, sir.

Q. You were a member, were you not, of Conductor Anderson's train-crew?

A. Yes, sir.

Q. And you were waiting to take over the control of First 582?

A. Yes, sir.

Q. Shortly after the train left and moved eastward out of Lemay you may state whether or not you were in the caboose of freight train First 582?

A. I was in the caboose.

Q. And were you in the caboose at the time the train came to a stop some distance east from Lemay?

A. Yes, sir.

Q. Will you describe for the jury the stop that occurred at that time?

A. Well, we were proceeding east, and, being deadheading, I didn't have my mind so much on the train, except that we were going, and we came to a sudden but easy stop. No jars whatsoever.

Q. At the time the train stopped you may state where you were within the caboose?

A. About the center of the caboose, on the south side.

[fol. 47] Q. And what were you doing at that time, Mr. Law?

A. I was a-holding onto everything that would hold.

Q. Because of the stop?

A. When a train goes into "emergency" it is liable to be rough; but at that time it wasn't. But we always get hold of whatever we can.

Q. How did you know it was "in emergency"?

A. Well, I heard the conductor say that it had gone into emergency.

Q. Which conductor made that statement?

A. Jorgensen.

Q. Did you notice the air-gauge in the caboose at that time?

A. No, sir.

Q. Will you tell the jury now, in your own language, what happened; what you saw and what you heard and observed, immediately after the train came to a stop?

A. After the train came to a stop I heard Conductor Anderson holler something about something not being able to stop. Of course I was still sitting down. I immediately got up, and looked back west, and seen the motor car coming, with both men looking back. Of course I could see the sides of their faces and their backs.

Q. About how far was the motor car from the rear end of your train at that time?

A. About three car-lengths, when I seen them.

Q. And where was Conductor Anderson and where was Conductor Jorgensen at that time?

A. Conductor Anderson and Conductor Jorgensen were both going towards the rear end; they were nearly to the rear of the caboose.

Q. You may state whether or not you got onto your feet?
A. I was on my feet when I seen the motor car.
Q. Do you have any opinion as to how much time had then elapsed between the time the train stopped and the time you heard Conductor Anderson make this remark?
A. Oh, not exactly. Three or four seconds.
[fol. 48] Q. You may state whether or not it was at that time that you glanced toward the west and observed this on-coming track car?
A. As soon as I got up. After I heard Anderson holler, then I got up, and then I seen the car.
Q. And what happened then?
A. Well, I could see I couldn't do any good; so I started towards the head end of the caboose.
Q. Why?
A. Well, I just—it just startled me, and I knew I couldn't do any good and I just wanted to be in the rear doorway.
Q. I take it that you heard the report of the collision?
A. I seen it and heard it, both. I was going backwards.
Q. Tell the jury what you saw and what you heard.
A. Well, I just seen the motor car coming towards the caboose, and then I heard the crash, and then I couldn't see anything.
Q. Did you see the men on the ground after the collision?
A. After I got out of the caboose.
Q. And where were the men's bodies at that time?
A. Mr. Lucus was laying on the north side of the caboose, by the steps, and Mr. Lynch was laying on the south side of the caboose, by the steps.
Q. How long did the train remain standing before it moved east?
A. Well, I wouldn't say. Several minutes.

Mr. Black: That is all. Thanks.

Cross-examination.

By Mr. Nebeker:

Q. Do you recall where you got on the train?
A. Beppo.
Q. Is Beppo west of Lemay?
A. That is the first station west of Lemay.
Q. And after you got into the caboose you had no duties until you were going to take over the train?

A. No, sir.

[fol. 49] Q. So you and Mr. Bowers and Mr. Agricola got to playing cards in the caboose?

A. Yes, sir.

Q. And where were you sitting?

A. On the south side of the caboose.

Q. Was there a table there on the south side?

A. Yes, sir.

Q. Do you recall which direction you were facing?

A. I was facing west.

Q. And Mr. Bowers and Mr. Agricola were at the same table?

A. Yes, sir.

Q. Did you hear Conductor Jorgensen talking to Mr. Anderson after the train stopped?

A. No, sir.

Q. Did you see Conductor Jorgensen look at the air-gauge on the caboose?

A. Yes, sir.

Q. Did you look at the air-gauge?

A. No, sir.

Q. It was some little time after Mr. Anderson shouted, that you got up so that you could see the approaching motor car, wasn't it?

A. A second or two; two or three seconds.

Q. Could you observe whether or not the motor car slowed down at all before the collision?

A. It didn't sound to me like it did. I could hear the motor working, and it didn't sound like it slowed down a bit.

Q. Quite a noisy motor?

A. Oh, yes. They are a lot noisier than a car. They have no muffler, like a car, and they are either one or two cylinder. They are just a "put-put;" you can hear them plain.

Q. They have iron wheels?

A. Yes, sir.

Mr. Nebeker: That is all.

[fol. 50] MAURICE LEE-THOMAS was duly sworn as a witness in the case and testified as follows:

Direct examination.

By Mr. Black:

Q. Mr. Lee-Thomas, will you state your full name and your address?

A. Maurice Lee-Thomas, 511 7th Street, Ogden, Utah.

Q. You are employed, are you not, by the Southern Pacific Company?

A. Yes, sir.

Q. In what capacity?

A. Brakeman.

Q. How long have you been working for the Company as a brakeman?

A. Since 1937,—nine years.

Q. You were employed as a brakeman on the 24th day of May, 1944, were you not?

A. Yes, sir.

Q. And I believe at that time your conductor was Mr. Jorgensen?

A. Yes, sir.

Q. You were working on First 582, eastbound, as it left Lemay, were you not?

A. Yes, sir.

Q. And what was your job on that train, Mr. Lee-Thomas?

A. Well, I was the rear brakeman, or flagman. They have two different names, flagman or rear brakeman.

Q. As the train pulled out of Lemay you were forward, were you not?

A. I was on the engine, yes.

Q. Do you recall the occasion of the train stopping in emergency?

A. Yes. I was on the engine when it went into emergency.

Q. Will you describe the stop?

A. Well, on the engine it was a smooth stop. There was no jerking. And we knew immediately that the air had gone at emergency, because the gauge on the engine told us so.

[fol. 51] Q. What did the gauge indicate?

A. Zero.

Q. And that showed that the air had been——

A. Had all gone.

Q. Was suddenly taken out of the line?

A. Yes.

Q. Was the engine working steam at the time the stop was made?

A. Yes, sir.

Q. About how fast was the train moving at that time?

A. I would say around 25 miles an hour.

Q. What did you do when the train stopped?

A. I started back to see what was the matter. I knew that Mr. Jorgensen had applied the air from the rear or that something had happened to the train that would cause the application—the emergency application.

Q. So that you walked toward the rear?

A. Yes.

Q. And what did you discover as you walked along the side of the train?

A. Well, I found the air escaping from this branch-pipe on this car.

Q. What kind of a car was it?

A. It was a P. F. E.—"Reefer" as we call them.

Q. How were you able to discover that the air was escaping from the branch-pipe in this "Reefer"?

A. Well, there is pumps on the engine, that—after the air is released that way there is air pumps on the engine that builds the trainline up to this pressure again.

Q. So that the brakes can be released?

A. Yes, sir. And if there is any air escaping, any pipes that are open or any angle-cock or air hose that would be open, where the air could escape, you can hear it coming through the pipe, like you could air coming through any [fol. 52] pipe. It would be escaping and these pumps were trying to build the pressure up, but they couldn't, because it was escaping through this branch-pipe.

Q. The air was making a hissing sound as it escaped through that branch-pipe?

A. Yes, sir.

Q. What did you do when you discovered that?

A. Well, I cut the—There is an angle-cock on there to cut the air; that is, the brakes, out of this particular car, and still have air go through the main trainline, through to the rear of the train, all through the train. Each car can be cut out independently of the others.

Q. In other words, you have a mechanism so that if the

branch-pipe is broken and the triple-valve becomes out of order, you can cut the air out of that particular car?

A. Yes, cut the car out and bleed the triple-valve from the reservoir, so that all the air is out of there entirely, so that the brakes won't stick.

Q. And that releases the brakes in that particular car?

A. Yes, sir.

Q. And from then on you don't have air brakes on that particular car?

A. That is correct.

Q. But you do have brakes on the rest of the train?

A. Yes.

Q. So that you did cut the air out of this "Reefer"?

A. Yes, sir.

Q. And you did that because the air was escaping?

A. Yes, sir.

Q. You may state whether or not you made any report of your findings to your conductor?

A. Yes.

Q. You made a report to Conductor Jorgensen?

A. Yes, sir.

[fol. 53] Q. Did you make that report before, or after, the train was placed in motion?

A. Well, there was quite a period of time there. I can't remember. I believe it was after we was going before there was anything mentioned of what happened.

Mr. Nebeker: So that the record will be straight, it may be stipulated, with respect to Plaintiff's Exhibit B, which is an (AX) Telegraphic Report of Accident, signed by D. E. Jorgensen, and with reference to this information: "Cab 216 Broken air hose & angle cock"—that that means that the caboose 216 had a broken air hose and angle cock, and I understand, Mr. Black, it may be stipulated that that breaking of the air hose and angle cock occurred by reason of the collision of the motor car at the rear end of the caboose.

Mr. Black: And that it was in good working order, as far as we know, at all times before the collision.

Mr. Nebeker: Yes.

Mr. Black: And had nothing to do with the stopping of the train.

Mr. Nebeker: That is correct.

Mr. Black: It may be so stipulated.

FRANK N. AGRICOLA was duly sworn as a witness in the case and testified as follows:

Direct examination.

By Mr. Black:

Q. You may state your full name, please.
A. Frank N. Agricola.
Q. You reside in Ogden, do you not?
A. At 441 River Drive, Ogden, Utah.
Q. You are employed by the Southern Pacific Company?
[fol. 54] A. Yes, sir.
Q. In what capacity?
A. As a brakeman.
Q. How long have you been so employed?
A. Since 1929.
Q. Were you in the service on the 24th day of May, 1944?
A. Yes, sir.
Q. And you were on First 582 was it moved eastward out of Lemay, were you not?
A. Yes, sir.
Q. You were a member of Mr. Anderson's crew?
A. That is right.
Q. And at that time, if I understand it, you boys were deadheading just waiting to take over the train?
A. That is correct.
Q. You may state whether or not there was a rear-end brakeman, or a flagman, on the caboose of that train as it moved out of Lemay who was a member of Mr. Jorgensen's crew?
A. No. Mr. Jorgensen was there by himself, and Anderson and his crew was there.
Q. But there was no rear-end brakeman, or flagman, who was a member of Jorgensen's crew?
A. No, there wasn't.
Q. It is customary, is it not, Mr. Agricola, to have a rear-end brakeman, or flagman, on these trains?
A. Yes, sir.
Q. As this train moved out of Lemay——

Mr. Nebeker: Just a minute. I move to strike that out; that question and answer.
[fol. 55] Mr. Black: I promise the Court that the mate-

riality of this matter will appear in subsequent questions here.

The Court: Well, subject to introducing that evidence.

Mr. Nebeker: There is only one specific allegation of negligence.

Mr. Black: I don't claim this for negligence at all.

Q. Mr. Agricola, do you recall the occasion when this came to a stop some distance eastward from Lemay?

A. Yes, I do.

Q. Can you describe the stop?

A. The stop was very fast, but smooth. No jar whatever.

Q. At the time that the train was rolling and coming to a stop you may state whether or not you paid any attention to the air-gauge?

A. No, sir, I didn't.

Q. Did you know at that time whether this was an emergency stop or an ordinary stop?

A. I didn't know.

Q. As the train was coming to a stop did you hear anything said by either Anderson or Jorgensen?

A. I hear Anderson say "We are going to get hit."

Q. How long was that after the train had come to a stop?

A. Well, now, I don't remember exactly whether the train was—I think it—when he said that the train was just stopping.

Q. And when he said that what, if anything, did you do?

A. Well, when the train—when he says "We are going to get hit", the train was still going; that is right. When he says, "We are going to get hit" I grabbed hold of the table—I grabbed ahold of the table until the train stopped. And when the train stopped I told Jorgensen, the conductor, and the crew. He asked me if I would flag for him, and he had let his flagman go to the head end, at Beppo, I think it was, and I says, "Yes, I will flag for you." So as quick [fol. 56] as the train stops I grabs my flagging equipment.

Q. Then what happened?

A. I went back to flag.

Q. Then what happened?

A. Well, before I could get out of the caboose the motor car ran into us.

Q. Did you see the motor car at any time before the collision?

A. No, I didn't

Q. Where was your flagging equipment that you grabbed?

A. Well, the flagging equipment—we always keep it handy, so that we can grab it as we go out of the caboose. We always keep it at either end of the caboose, so that we can grab it as we go out to flag.

Q. What did the flagging equipment consist of?

A. Red flag, fusees, torpedoes.

Q. That is one of those great, big matches, those things you fellows strike?

A. Yes.

Q. They are red or yellow?

A. Yes. We don't use any yellow.

Q. So that you grabbed a red fusee?

A. I grabbed a torpedo—couple of them.

Q. Where were you from the rear end of the caboose at the time of the collision?

A. Oh, I was in the middle of the caboose, approximately.

Q. How much time had elapsed between the time when Anderson said something about "We are going to get hit" and the time when you did get hit?

A. Well, there wasn't much time. I would say seconds.

Mr. Black: That is all. Thanks.

[fol. 57] Cross-examination.

By Mr. Nebeker:

Q. I think you described the stop as fast but smooth?

A. That is right.

Q. Do you have a judgment, based on your experience as a railroad man, how many car-lengths a train would run after the brakes went into emergency and before it came to a full stop?

A. Well, I would judge it would be between—with heavy loads, and we were that way—it would be between 30 and 40 car-lengths.

Q. Was it rolling to a stop?

A. Oh, yes.

Q. Assuming, as we just heard in the testimony, that the engine was working steam after the brakes went into emergency, would that have a tendency to string the train out and keep it from coming to a stop by jerks and too fast?

A. That is right.

Q. Is that the proper way to stop a train in emergency?
A. I think it is.

Q. Keep the engine pulling it?
A. I think it is.

Q. And after the train stopped Mr. Jorgensen asked you if you would flag for him?

A. No—just at that time he didn't. I already spoke to Jorgensen and he had asked me.

Q. So that is after you had got on, but before the accident?

A. Yes, long before the accident.

Q. So that you knew that would be your job?

A. Yes. I told him I would protect for him, and then he released his flagman to go to the head end.

Q. You never did see the men on the motor car before the collision?

[fol. 58] A. No, I didn't.

Q. Did you hear Jorgensen or Anderson calling the men on the motor car, trying to attract their attention, yelling at them?

A. It seems to me like that Anderson hollered several times. After he said, "We are going to get hit" it seems to me like I heard him holler several times, but his voice is quite heavy, and when he tries to holler loud he just can't holler loud; but he did his best to holler loud; I know that.

Q. Both Jorgensen and Anderson were hollering at the men on the motor car, weren't they?

A. They probably were.

Q. And that hollering took a matter of a few seconds?

A. A few seconds, yes, a very few seconds.

Mr. Black: I understand Counsel are willing to stipulate that the point of collision would be somewhere near the 3rd or 4th telephone posts westward from mile post 704.

Mr. Ray: That is approximately correct.

ALVIN O. LYNCH a witness on behalf of defendant, testified by deposition as follows:

"Direct examination.

"By Mr. Nebeker:

Q. Will you state your name?
A. Alvin O. Lynch.
Q. Where do you live?
A. In Ogden at present.
Q. What is the address?
A. 3057 Porter Avenue.
Q. Does your wife live there?
A. Yes.
Q. You expect to be inducted into the Army shortly? Is that correct?
A. Monday morning.
[fol. 59] Q. And do you expect to move from Ogden as soon as you are inducted?
A. No,—my wife intends to stay there.
Q. I mean you personally?
A. Yes, me personally.
Q. Do you know where you are going?
A. I don't know.
Q. Calling your attention to the 24th of May, 1944, were you working for the Southern Pacific Company at that time?
A. Yes.
Q. How long had you worked for it prior to that, approximately?
A. I started in June, 1942.
Q. Working out of Ogden?
A. Mt. Shasta, California.
Q. On the 24th day of May you went from Ogden to Lemay, approximately?
A. Around 1 or 1:30.
Q. Then what did you do after you got there?
A. Well, trains sometimes meet this relief maintainer at Lemay. This fellow carried me into the tool house to show me the tools and equipment they have there to work with.
Q. When you say 'this fellow' do you refer to Frank Lucus?
A. Yes.
Q. You were introduced to him as Frank Lucus?

A. I was introduced to him as Frank Lucus.

Q. You met a man there named Moss?

A. Yes, sir.

Q. Did you also spend some time in looking over the forms you expected to fill out as signal maintainer?

A. Yes.

Q. Did you have your dinner at Lemay?

[fol. 60] A. No; I ate on the train before I got to Lemay.

Q. You ate on the train?

A. Yes.

Q. What work were you going to do at Lemay?

A. I was taking over the maintaining.

Q. Maintaining the signals?

A. Yes, sir.

Q. Would that include Lemay and east of Lemay?

A. Yes, and a little ways west. I couldn't say how far.

Q. Do you know approximately how far east of Lemay you would go?

A. I went to the east, the end of Hogup.

Q. Did you start on a trip with Mr. Lucus that afternoon?

A. Yes.

Q. Do you know what the purpose of the trip was?

A. As far as I knew it was to deliver checks.

Q. Why did you go together?

A. Mr. Moss told me to go with him to look over the territory. I would have to be going to the other end of it he thought.

Q. What did you ride on on that trip?

A. On a motor car.

Q. Can you describe it in a general way?

A. Well, I don't know. It is just a motor car, supposed to be a one-man car. It is a flat-top car I was sitting on one side and Mr. Lucus was on the other.

Q. As you were proceeding easterly after you started, you would be sitting on which side of the motor car?

A. The south.

Q. Sitting on the south side?

A. Yes.

Q. Was Mr. Lucus sitting on the north side?

[fol. 61] A. Yes.

Q. Who was running the motor car?

A. Mr. Lucus.

Q. Do you recall where that motor car was when you first saw it?

A. It was in the tool shed.

Q. At the Lemay station?

A. At the Lemay station.

Q. What did you do with it—or what was done with it before the trip started?

A. The only thing that was done to it was put it onto the track and pulled up and went into the north siding there at Lemay. We did no work at all on the motor car.

Q. Then where did you take the motor car when you put it on the north siding?

A. Up to the far end to wait on this freight train to come out of the south siding; east end of the north siding.

Q. Do you know about how long you waited at that point before you started your trip?

A. I couldn't get it into minutes.

Q. Some considerable time?

A. No; not too long. This train was coming out when we stopped.

Q. Can you identify that train? Do you know whether it was First 582."

Mr. Black: That "5, 82" should be "582," making it read there, First 582. (As written above.)

A. I don't remember.

Q. Now, while you were waiting at the east end of the north siding at Lemay where was this freight train?

A. It had started out of the south siding.

Q. It was on the south siding?

[fol. 62] A. Yes; it was coming out.

Q. And it went east?

A. It went east.

Q. Where are the switch points for the south siding with respect to the switch points for the north siding; do you know? Were they east, or west, of where you were waiting?

A. They were west of where we were waiting—the switch points for the south siding?

Q. Yes, the switch points for the south siding were west?

A. They were west.

Q. Did you pay any attention to the train as it pulled onto the main line?

A. No.

Q. Do you know whether or not any member of the crew on this freight train that was proceeding east had to close the switch after they got onto the main line?

A. No, they did not.

Q. Who closes that switch?

A. The operator at Lemay.

Q. Now, as this east-bound freight train passed you and Mr. Lucus where was your motor car?

A. It was sitting at the fouling point on the side track.

Q. After the train passed you what did you do?

A. We pushed this car down to the main line and lifted it over on the main line; then Lucus got on and I pushed it off to start it.

Q. About how far do you think it was from the fouling point to the switch points?

A. I don't know exactly, but I would say around 40 or 50 feet.

[fol. 63] Q. You didn't throw any switch to get it on the main line?

A. No.

Q. Do you know about how far you pushed it to start it?

A. Fifteen or 20 feet.

Q. You jumped on it then?

A. I jumped on it then.

Q. Which side did you sit on?

A. Sat on the right; south side of the motor car.

Q. South side?

A. Yes.

Q. Which way would your body be facing?

A. The way I was sitting, the front of me was facing south.

Q. Did you observe where Mr. Lucus got on?

A. He was on when I pushed the motor car.

Q. Which side was he on?

A. He was on the north side, the left side, of the motor car.

Q. Who was operating the motor car?

A. Mr. Lucus.

Q. Was it constructed for one-man operation?

A. One-man operation.

Q. When was the last time you saw the freight train?

A. When I hopped on the motor car.

Q. Did you have any estimate as to how far away the rear end of the freight train was when you got on the motor car?

A. I would say three or four hundred yards.

Q. After you got on the motor car what did you do?

A. I turned my back to Lucus and was watching behind.

Q. Watching in a westerly direction?

[fol. 64] A. Westerly direction.

Q. Do you know whether you ever turned around to look east before the accident occurred?

A. I never noticed the train after I sat down on the motor car.

Q. Did you ever look east after you sat down on the motor car?

A. No, I don't think so.

Q. Would you have an estimate of how far you had gone before the accident occurred?

A. Around half or three-quarters of a mile I would say. That is just my estimate.

Q. You have never observed the point where the accident occurred, to check how far it is from Lemay?

A. No.

Q. Do you know how fast your motor car was going after you got it started and got on it?

A. I do not, but I don't think it was going at an excessive speed.

Q. Do you know whether or not any brakes were applied before the moment of the collision?

A. They were not applied.

Q. They were not applied?

A. No.

Q. What was the next thing you remember?

A. Coming to on a caboose of the freight train.

Q. Was that the freight train that had preceded you out of Lemay?

A. Yes.

Q. Would you have an estimate of about the time of day that you started this motor car and began this trip easterly?

A. I would estimate around 3:30.

[fol. 65]. Q. What was the condition of the weather?

A. Pretty;—clear.

Q. While you were sitting on the motor car looking westerly was there anything that attracted your attention? Were you noticing anything in particular?

A. I was watching a signal.

Q. Do you know what signal it was you were watching?

A. It was westbound signal at the east end of Lemay.

Q. Your purpose in taking the trip was to familiarize yourself with the signals?

A. With the territory and signals.

Mr. Nebeker: That is all.

Cross-examination.

By Mr. Black:

Q. Mr. Lynch, when the track car was placed onto the track there at the east end of the north siding at Lemay where was the rear of this east-bound freight train?

A. It had passed, going east.

Q. About how far from you was the train at that time?

A. When I started the motor car I would say around three or four hundred yards.

Q. By the way, about how long a train was that?

A. I don't know.

Q. Had you ever known Frank Lucus before the 24th of May, 1944?

A. No, I had not.

Q. That is the first time you had ever seen him?

A. First time I had ever met him.

Q. I think you said you met him about one o'clock in the afternoon that day?

A. One-thirty, something like that.

Q. About 1:30?

A. 1:30.

[fol. 66] Q. I take it you were with him continuously from 1:30 up until 3:30?

A. Except a few minutes when he went into the operator office.

Q. And where is the operator office?

A. Just north of the tool shed where the motor car was.

Q. Do you know why he went in there?

A. No, I do not.

Q. How long was he in there?

A. Oh, 15 minutes, I would say.

Q. And when was that that he was in there?

A. Just before we put on to take our trip.

Q. From whom did you procure your directions, from Mr. Lucus, or Mr. Moss?

A. Mr. Moss told me to go with him to see the territory.

Q. Now, this track car, as far as you knew, was in good shape, wasn't it?

A. I knew nothing about the track car at all.

Q. You had never operated one before?

A. I had operated cars, but not this one.

Q. As far as you knew, it was in good shape?

A. I knew nothing about it.

Q. Mr. Lucus was operating the car?

A. Yes.

Q. Just tell us just how you operate one of these cars?

A. This motor car is a direct-drive; have to push it, though, to start it, and it is in gear all the time. So far as running it, all you have is your gas and brakes to operate.

Q. And where is this gas lever?

[fol. 67] A. Just in front of the operator.

Q. And he operates it from the seat on the left side?

A. Sitting on the left side.

Q. Left side?

A. Left side.

Q. Were you talking to Mr. Lucus after you got the thing started?

A. Hadn't said a word from the time he started the motor car.

Q. I think you stated you had never tried to find the place where the collision between the motor car and the rear end of the train took place?

A. No way of telling. I haven't even stopped to look or nothing.

Q. No way of telling?

A. To my knowledge, I had no way of telling.

Q. In other words, your last memory is getting onto the motor after you had the thing started?

A. After it had started.

Mr. Black: Getting onto the tracks, is what I want to say, after the motor was started.

Q. The next thing you remember was coming to in the caboose?

A. Yes.

Q. You think Mr. Lucus was going to deliver the pay checks?

A. To my understanding; he was delivering pay checks.

Q. Do you know to whom he was going to deliver the checks.

A. I do not.

Q. You don't know?

A. No.

[fol. 68] Q. As near as you can recall, how long did you have to wait for this eastbound freight train?

A. Just a few minutes.—Did you know how far east you were going on that trip?

A. No, I didn't; I didn't know exactly how far we were going. He said we may have to go to Hogup; that is the end of the line.

Q. How far is Hogup from Lemay?

A. I don't know.

Q. Haven't you ever found out since?

A. No.

Q. Now, as I understand it, while you were with Mr. Lucus he took you into his private quarters and showed you how to make out the reports that were necessary?

A. Yes.

Q. It is stated here in the letter: 'We left his car about 3:45 p. m.' Is that right, or wrong?

A. Well, I won't say at the time because I don't even know the time exactly of the wreck. I know the time 28 is due in there, somewhere around 4 o'clock, and it happened before 28 got there.

Q. What time is 28 due at Lemay?

A. Somewhere around 4 o'clock.

Q. Were you looking westward along the tracks to determine when 28 arrived?

A. Not to determine when 28 arrived. I was watching the signals.

Q. Why were you watching the signals?

A. Just to see when it cleared, is all I know.

Q. When would it clear; ordinarily?

A. It cleared after that train passed the battery cut west of Lemay. There is a train going west and one coming east. We were following the eastbound. I was watching the signal this westbound train was holding. [fol. 69] Q. When the westbound moved out of the second block ahead, the signal you were watching was clear?

A. Was clear.

Q. Then you were just watching those signals because of your own personal interest?

A. My own interest.

Q. You don't know what Mr. Lucus was doing at that time?

A. No. I wasn't watching him.

Q. What is that?

A. No, I don't.

Q. As far as you know, he might have been watching the same signals?

A. I had my back to him; I don't know what he was doing.

Q. What is the condition of the track, as you recall it, in the vicinity between Lemay and the station to the east, known as Newfoundland? Is it level?

A. It is level; straight.

Q. It is level and straight?

A. Yes."

[fol. 70] EDITH B. LUCUS was duly sworn as a witness in the case and testified as follows:

Direct examination.

By Mr. Black:

Q. You may state your full name, please.

A. Edith B. Lucus.

Q. Where do you reside?

A. 5715 Riverton Avenue, North Hollywood, California.

Q. How long have you lived there, Mrs. Lucus?

A. I have lived there since 1931.

Q. Mrs. Lucus, how old were you on the 24th day of May, 1944?

A. Well, I am 51 now, and that is just two years ago. I was 49.

Q. You were forty-nine years of age at that time?

A. Yes.

Q. When and where were you married to your deceased husband?

A. We were married in Kingman, Arizona, on December 26, 1936.

Q. December 26th?

A. The day after Christmas, 1936.

Q. Your husband was somewhat younger than you, was he not?

A. Well, he was a few years younger, yes, sir.

Q. What was his age at the time of his death, as near as you can recall?

A. Thirty-nine.

Q. After your marriage you may state whether or not you and your husband resided in Los Angeles or vicinity?

A. We resided at our address, 5715 Riverton Avenue.

Q. And during the time you lived together as husband and wife you continued to reside at that place?

A. Yes, sir.

Q. Mrs. Lucus, what was the nature of your husband's employment at the time of your marriage?

A. He was employed at the Compton Printing Company, in Los Angeles. That is a printing establishment, and he was [fol. 71] what you might call a technician. He was familiar with all the printing machinery. He was very well schooled in that knowledge of machinery.

Q. Do you know how long he had been employed there at the time of your marriage?

A. Well, I understood he had worked there many years before I married him. He had been there about, approximately 15 years altogether.

Q. You may state whether he continued to work there after your marriage?

A. Yes, steadily.

Q. Do you know what his approximate monthly earnings were while he was so employed, by this printing company?

A. Well, when we were first married he was making—his salary checks were about $40 a week, and I think as the years progressed that was increased a little bit; so that he worked up to about $200 a month.

Q. At the time you were married you were employed, were you not?

A. Yes, sir.

Q. Fact of the matter, you are still employed, are you not?

A. Yes, sir.

Q. You have spent the larger portion of your mature years in employment, haven't you?

A. That is right.

Q. Will you tell the jury what the general nature of your relationships with your husband were during the early years of your marriage?

A. Well, in 1936, 1937, 1938, 1939, and 1940 everything went along very well. I got good support from him and he was steadfast and true, as far as I know, and everything was, as far as I know, the way a wife would want it. Then in 1941 his mining interests——

Q. Stop there, and tell the jury about those mining interests; what they consisted of.

[fol. 72] A. He had a "hip" to go out into the mines. Although he worked steadily, he would go out on Sundays and holidays and sometimes I went with him and sometimes I stayed home and got the dinner and kept house. And of course I was employed. I would have a lot of duties to take care of on the week-end; but we had many enjoyable trips together.

Q. He was a prospector, wasn't he?

A. Yes; that was his "hip". And then when he came home he had a little laboratory there, and then in the evenings right after dinner he spent a lot of time going over his samples. He was working on a scheme to get the precious ores out of the different rocks he had found. So, that way, he was home all the time and he was getting actually interested there, and I had planned on stopping work, to——

Q. Just a moment, now: That relationship that you have just described now continued, Mrs. Lucus, up until sometime in 1940?

A. He was still home and coming and going in 1941, but in the beginning of 1941 he used to stay out, and the support was less.

Q. Go ahead.

A. And there were certain situations that became a little bit disagreeable, on account of his staying out so much and going out, that, well, I didn't know where he was several times, and we had several chats about it, and it caused a little bit of disgruntlement, and there was disharmony and discord there. He used to go over to his mother's a great deal, and spent considerable time there. So in 1941 he was alternating between our place and his mother's place, and, although he came and went and there were marital relations, it wasn't as I called it in the prior years. So that it came to the point that in August——

Q. August, 1941?

A. August, 1942; I was amused one day to get an action handed to me, of divorce.

[fol. 73] Q. Had you ever had any discussion with your husband concerning a divorce, before that time?

A. No, sir.

Q. And papers were served upon you. Did some officer of the law hand you some papers there in 1942?

A. I think it was a woman, that came to the back door and handed them to me.

Q. What month in 1942 was that?

A. That was in August.

Q. In August, 1942?

A. Yes, sir.

Q. Let us go back a moment: You stated that in 1941 your husband started to remain away?

A. More than I thought was right, for me to be a wife and a husband to be away, and all his business had been different, like a traveling salesman or something. Although we lived over the hill, close enough for him to be near his mother's, I thought he belonged at his home and not to be at his mother's so much, and that caused a bad feeling; it made me unhappy, there, to have him away from home.

Q. Well, eventually your husband ceased coming home entirely; isn't that true?

A. All through 1941 he came and went. All through 1942 he came and went, clear up to April. To April he was giving me money and he was even coming home. In April, May, June, and July I didn't get any money, but in April to July he still had his chemicals and his laboratory set up there and he was coming out and making laboratory experiments in the home clear up to July, 1942.

Q. It was in August, 1942, when this lady handed you the papers?

A. Yes, sir.

Q. When you got those papers what did you do with them, Mrs. Lucus?

[fol. 74] A. Well, naturally, I was surprised. I didn't know just what to do right away; I had stopped to think, and naturally I loved my husband. I wasn't going to let him go that easily; so I immediately tried to get an attorney. I had no legal obligations. And I found an attorney out in Burbank, which was close to where I lived, and I told the story: I wanted to preserve the integrity of the home,

and I wanted to get the proper support and respect from my husband, and I wasn't going to let him divorce me on default. So I made a counter-complaint, and stated the situation, that my husband was staying out part of the time and I wasn't getting proper support,—and I left it to the attorney.

Q. And you did file some kind of counter-action?

A. I filed a counter-complaint asking for support and maintenance.

Q. Did you ask for a divorce, in your counter-action?

A. No, sir.

Q. What happened to that action, if you know, Mrs. Lucus?

A. What happened to that action?

Q. Was there ever a trial on that action, that you know anything about?

A. No, sir; not on that first one.

Q. That was in the latter part of the year 1942?

A. Well, the divorce complaint came in August, and then I made this suit for maintenance in September, and that was on September 12th, as I recall. Then he was still in Los Angeles, working down at the Compton Printing Company, and we got together, and we went over to my Attorney's office, and we then and there, in the presence of the attorney, made an agreement. He was contemplating going into the Army, and we then and there made an agreement that we would withdraw our grievances about this divorce and the maintenance suit, because he was going in the Army, and he would make an allotment to me. And so that was [fol. 75] signed in the presence of the attorney, and, as I recall it, that was on September 19th, 1942, I believe. And so that was—he was going to go into the Army, and I was going to get the allotment. He hadn't been down for his physical examination; so he didn't know where he stood with the army, and neither did I, and naturally I took it for granted he would be accepted, because he apparently seemed to be in good health. But he didn't pass the physical examination, and he went down as a "4-F." And that was around the latter part of September. And then I understand, from later things that came up, that he didn't work at the Compton Printing Company between September 25th and up to the date of the next maintenance suit. After my husband made that agreement he didn't give me any support. And so I saw fit—In the face of the fact that he didn't

go into the service, I saw fit then to serve a second suit for maintenance, to get that support. Now, that second suit for maintenance was—I don't recall the exact date; but, anyhow, the hearing for it was stipulated for January 6th. So we met down in the courthouse on January 6th, 1943, in Los Angeles, and the judge there decreed, after he heard the situation, that my husband should pay me ten dollars a week beginning February, 1943. After that I guess my husband left Los Angeles. That was the last day I saw him alive, January 6th, 1943.

Q. And, there was an order requiring him to pay you ten dollars a week beginning in February, 1943?

A. Yes, sir.

Q. You say you never saw your husband after that occasion?

A. No, never saw him alive.

Q. Did you hear from him after that?

A. No—I didn't know where he was.

Q. Did you make any effort to find out where he was?

A. Well, I made all the efforts that were at my resources there in Los Angeles. I wrote letters to the address of his mother, that came back. I called up the Draft-board, who [fol. 76] had his record in Van Nuys, California, which is the closest district to where we lived, and I thought perhaps if he had left town he would have left an address there, but she frankly told me that he had no forwarding address at the Van Nuys Draft-board. I called up the office of the Compton Printing Company. I said, "I can't locate my husband," and I was very much in distress, and they said, "Well, we understand he joined the Navy." So I spent two afternoons from my work and I went down to the Navy recruiting office, and I inquired there, and they searched lists, and I exhausted whatever possible means was at my command, to locate my husband, without leaving my home or my position. I could have——

Q. What you could have done is not material. What about any letters? Did you send any letters to anybody?

A. No, I didn't write any letters. Well, I wrote to my husband in care of the mother, and it came back.

Q. When was the next occasion that you received any information as to where he had been or what he was doing?

A. The very first time I knew the whereabouts of my husband was when the agent from the Railroad advised me of my husband's death.

Q. Where were you at that time?

A. Well, that evening of course it was lonely at the house and everything, and after work I had been accustomed to going home and getting dinner and things, and I had my dinner alone, and I went to a movie,—and I went out on the back porch to feed the cat, and I heard a footstep, and I perked up. I thought it was Bill coming back,—and he said he was the agent, and he said "Are you Mrs. Lucus?" and I said, "Yes.". He said, "Your husband was killed on the Railroad today." And I looked at him. I couldn't believe it. I says, "What?" He says, "You are Mrs. Lucus?" I says, "Yes." Well, I settled down and tried to get my breath. I said, "I didn't even know he was working for the Railroad." I said, "Have you told the mother?" He says, "I just came from there." I said, "Did you ap-

[fol. 77] proach her in that blunt manner too?"

Mr. Nebeker: I think that is immaterial.

Mr. Black: That is immaterial.

Q. Those were the next words you heard, as you related?

A. Yes.

Q. Drawing your attention, Mrs. Lucus, to Counsel's opening statement, about the funeral and burial of your husband: You may state whether or not you participated in the burial of your husband?

A. I will just go on from the conversation with the agent——

Q. Conversations are immaterial——

A. Well, I didn't have no opportunity at all.

Q. Just a minute: The conversations that you had with the agent and with other people are immaterial. I will ask you to state whether or not you participated in the burial of your husband?

A. I was given no opportunity to participate in the funeral.

Q. Did you ever at any time have any opportunity to make any burial arrangements?

A. No, sir, with the exception that the agent said the mother wanted to have the arranging, the mother wanted the arrangements.

Q. Did your husband's mother make the arrangements, do you know?

A. Well, when I called up to give her the respect of having—letting her have the privilege of burying her only son,

that was solved, letting her have him. They told me that they had already sent for him, sent for the body; they had chosen the funeral parlor in Los Angeles where he was to be taken,—and I had nothing else to do, and I gave her authority then to go ahead and choose the funeral and the church and whatever services they wanted.

Q. Did you attend the funeral?

A. Oh, yes; indeed. I had a very beautiful bouquet, "To My Loving Husband" on the casket. Indeed I attended the funeral. But I let her have the—I gave the mother the honor that the wife should have. I felt that under the cir- [fol. 78] cumstances that the last relationship was a little estranged, and the mother, I always felt that I should let the mother have him, and I did.

Q. During the years that you lived with your husband, before he started to remain away, about how much, if anything, did he contribute to your support and the upkeep of the home?

A. You mean all through the period?

Q. Yes.

A. Well, from 1936 to 1941 there was a regular support; they averaged anywhere from 50 to 75; sometimes a little more, sometimes a little less; but that would be the average, a month.

Q. Per month?

A. Per month.

Q. What, if anything, can you say with reference to contributions made to you in the year 1941?

A. Well, they weren't regular. I got contributions, but they weren't regular. I couldn't rely upon them. That is one reason I mentioned that in the complaint.

Q. What I want you to do is state what those contributions were,—regular or otherwise?

A. Well, they probably dwindled down and sometimes I was reduced to 25 or $30 a month on the average.

Q. Did you receive any contributions in 1942 at all?

A. Clear up until April, 1942.

Q. Tell us about the contributions you received from year to year.

A. I got about the same—less.

Q. About 25 or 30 dollars a month?

A. Yes; that is it.

Mr. Black: Thank you; that is all.

[fol. 79] Cross-examination.

By Mr. Nebeker:

Q. Mrs. Lucus, you remember your deposition being taken in Los Angeles in this case; you remember the occasion that your deposition was taken?

A. Yes.

Q. You appeared before a Notary Public down in the Pacific Electric Building, and certain questions were asked you there?

A. That is right.

Q. And you gave certain answers; is that correct?

A. Yes, sir.

Q. And Mr. Coray, who sits at the Counsel Table, was there at that time, representing you as your attorney at that time?

A. Yes, sir.

Q. And a man named Collins represented the Southern Pacific Company?

A. That is right.

Q. And after the deposition was transcribed by the reporter it was read by you and corrected and then signed, wasn't it?

A. That is right.

Mr. Nebeker: I ask that the deposition be published, for the purpose of cross-examination.

The Court: It may be published.

Q. I think your counsel has obtained photostatic copies of these proceedings that we have discussed, which occurred between yourself and your husband in the Superior Court of the State of California?

A. Yes, sir.

Q. That was within and for the County of Los Angeles?

A. Yes, sir.

Q. And I have no doubt that you have seen those proceedings?

A. Yes, sir.

[fol. 80] Q. Calling your attention, Mrs. Lucus, to the photostatic signatures that appear in this document, purporting to be the signature of Edith Naomi Lucus, I wish you would examine that and tell me if that is your signature?

A. That is right; that is my signature.

Q. The signature I just called your attention to appears on the answer to the complaint in the case. Now, there is another signature, on a document which has the title "Cross-complaint for Separate Maintenance." Do you recall that signature?

A. Yes, sir.

Q. I call your attention to the signature—is that your signature?

A. Yes, sir.

Q. And that signature, if I may take the time to read the affidavit, follows this affidavit: "Edith Naomi Lucus, being by me first duly sworn, deposes and says, that she is the defendant in the foregoing and above entitled action; that she has read the foregoing cross-complaint and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters she believes it to be true." Bears the signature of C. Oscar Kalenius; is that correct?—Kalenius was the attorney and he was also the notary public?

A. Yes, sir.

Q. And he took your oath in your presence and you swore to that answer and cross-complaint?

A. That is correct.

Q. Had Mr. Kalenius done any work for you before this divorce action?

A. None whatsoever, as I recall. I had a little probate matter concerning an estate of my mother. I don't recall whether that was before or after.

Q. You had known Mr. Kalenius for some time before?

[fol. 81] A. I hadn't known Mr. Kalenius. Until I got the divorce papers I didn't even know an attorney.

Q. You employed him then for the purpose of protecting your interests in the divorce action?

A. That is right.

Q. And you had on numerous occasions talked with him about your affairs after you employed him?

A. That is right.

Q. And told him the facts regarding your relationship between yourself and your husband?

A. Yes.

Q. How long had you lived in this house that you say Mr. Lucus and you lived in after your marriage; how long before your marriage had you lived in the house?

A. Well, I bought it in 1931.

Q. And you have lived there ever since that time?

A. That is right.

Q. It is a two-story house?

A. It was a one-story house, but after I lived there a while I had the upper story remodeled into an apartment.

Q. And then you rented that apartment?

A. Well, it was vacant for a while. It had been rented, but it was vacant part of the time, because—well there was a while nobody lived up there at all, but after it was fixed up I had it rented.

Q. You got how much a month for that?

A. Thirty-five dollars a month.

Q. And that continued during most of the time of your married life, except such times as it was vacant?

A. No. That wasn't fixed up until, Oh, I think it was about two years after our marriage. I can't remember the dates, but I know that that apartment was vacant that first year. He was using just the empty rooms up there for a laboratory.

[fol. 82] Q. Then you had it fixed up and used it as income?

A. Yes; but it wasn't until later years I used it for income, because I didn't have any money to have it fixed up.

Q. You were working all the time during your married life?

A. Yes.

Q. And for a great many years before that?

A. Yes. I have always worked.

Q. You started working for the Veterans' Administration just a year before you were married, didn't you?

A. Yes, sir.

Q. Is that office in North Hollywood, or near there?

A. No. I work in the Los Angeles office.

Q. Now, as a matter of fact, one of the causes of trouble between yourself and Mr. Lucus was the fact that he spent a good deal of money and time and effort a-drinking, didn't he?

A. Did you ask me a question?

Q. Yes. I said, he spent a good deal of time and attention and money on drink?

A. Well, I wouldn't know. He was a moderate drinker, but I wouldn't know how much money he spent.

Q. I don't expect that you would know just how much money he spent on drink, but the fact of the matter is that that was one of the causes of trouble between yourself and Mr. Lucus?

A. Well, I would say that that was a contributory cause; not all.

Q. Did his drinking seem to get worse in 1941 and 1942?

A. His absences were more, and I wouldn't know whether that was from drinking or not.

Q. Do you know whether his absences had anything to do with his friendship for or association with a woman named Johnson—Mrs. Sophenia Johnson?

A. No, I wouldn't know that. I never was able to find anything on that.

[fol. 83] Q. You knew that he had this other woman friend that he was friendly with, didn't you?

A. I could never establish it.

Q. I am not asking you what you could establish, but I am asking you whether that was not one of the sources of irritation between you and your husband?

A. No; I wouldn't know. It was going away and going out; I didn't know where he was.

Q. But you said in your deposition that as to his association with this——

A. I never mentioned any names there.

Q. You had your suspicion about that, didn't you?

A. I said I had some suspicions, but I didn't mention any name.

Q. But the attorney who was asking you the question mentioned the name, didn't he?—You remember that you were asked about Mrs. Johnson on this deposition?

A. I had nothing to affirm or know.

Q. That is all I am asking you now.

A. That is natural for a woman; as soon as anybody comes, or even hearsay, then you start to become suspicious. You love the husband, and it is a natural reaction to become suspicious.

Q. And particularly if the husband is staying away and apparently doesn't reciprocate your love; is that correct?

A. Of course that would add to it, but I understood he was staying at this mother's, and I verified it many times; he was at his mother's.

Q. Did his drinking increase in 1940 and 1941?

A. No.

Q. It was about the same all the time?

A. It was about the same all the time. Of course, when he was home. Of course, I had no way of knowing what he did away from home.

[fol. 84] Q. But his absences from home increased after 1941?

A. In 1941 he started to stay away from home more than usual.

Q. And you thought he was staying at his Mother's place?

A. Well, it was understood he was staying to his Mother's place. His car used to be parked over there, and he had a room over there.

Q. How far was that from where you lived?

A. We lived over in North Hollywood, and it is quite a drive over the hill.

Q. That was closer to his work?

A. Yes.

Q. And he would stay there for a week at a time?

A. Sometimes in 1941 that is where he used to stop over there. Sometimes after a mountain trip he would stop over there instead of coming home.

Q. He didn't tell you whether he was coming home, at any time?

A. That was in 1941 and 1942, when I couldn't rely on when he would be home. I would drive over there many times and find him there.

Q. He didn't feel under any obligations to tell you where he was or what he was doing?

A. I wouldn't say—I wouldn't know what he felt about it.

Q. Well, he didn't tell you where he was?

A. It was sometimes just the uncertainty. He would say, "Well, I will be home," and sometimes he didn't come home. Sometimes I would have dinner ready and he would go out to the hills, and instead of coming directly home he would stop over at his Mother's and she would have a dinner ready for him and he would settle down there, and in the meantime I would be waiting for him at home. And he didn't think of it the way I looked at it. I was worried, and wondered if he had fallen down an abyss and gotten hurt.

Q. He didn't tell you whether he would be home or not, at night?

A. Part of the time. Sometimes he did and sometimes he didn't.

[fol. 85] Q. The statements you swore to in your cross-complaint for separate maintenance were made under oath, weren't they?

A. Yes, sir.

Q. And they were true?

A. Yes, sir, as far as I knew.

Q. And you don't want to modify those in any way?

A. Well, the only modification I say is that the time I got this divorce action I had one prime object in mind, and that was to preserve my home. That is all I thought about. And I went to my attorney and I told the story of the situation, and I said, "I don't want my home broken up," and I said, "You do what is right." And the phraseology and the words that are used in there are what my attorney approved, and if I had known about it what I know, that I would be called to answer for every one of those words, I probably would have been more careful what I said; but those are the words my attorney used, and I was sincere in protecting our home and preserving it, knowing that my husband would come back some day from this frustration he had been going through; going through all this mining and having no returns on his money.

Q. Were you interested in protecting your home, or in getting some money from Mr. Lucas?

A. I was interested in preserving the integrity of the home, primarily.

Q. Did you think you could restore Mr. Lucas's affection for you, if he had previously had affection, after making the statements that you did in this cross-complaint about him, or did you make those for the purpose of obtaining some support money from him?

A. Well, the attorney used this for the purpose of obtaining support money, and I read it and, under the circumstances, I signed it.

Q. You signed it in order to get money from Mr. Lucas?

A. I signed it to impress upon him certain situations; that he should be more careful about home, and come home, [fol. 86] and be steady, and all that, and I thought it would tend to bring him home.

Q. Now, your attorney made it clear to you that when Mr. Lucas filed his complaint for divorce, that if you successfully defended that there would be no divorce—would there? He made that clear to you, didn't he, that if you

successfully defended Mr. Lucus's suit for divorce that no divorce would be granted?

A. Well, I understood that it would go in default if I didn't make a cross-answer.

Q. After discussing the situation with your attorney you decided to file a cross-complaint for separate maintenance yourself, didn't you, and you did file such a cross-complaint?

A. Yes, sir.

Q. And certainly you understood that the purpose of that was to get that right to live separate and apart from Mr. Lucus, but to make him pay you money; you understood that, didn't you?

A. For the prime purpose—he had access to the home, coming and going all the time; it wasn't an idea of separate—the main thing was so that divorce couldn't go in default, and I had to make some answer, and that was it.

Q. You made the answer to get ten dollars or something a week, in order to get some money from Mr. Lucus, didn't you?

A. I was primarily interested in keeping the home from falling apart, and divorce means a separation and breaking down of the home, and I did what I thought most expedient; what I thought in my heart was the expedient thing to do at the time, to preserve the integrity of the home which I had worked for and struggled for. I had worked so that he could have money to spend to go to the hills to follow out his love. I had hoped for the day when I could quit my job and we could be home and be happy. And then these absences started, and that was my way of trying to protect the home. A little paltry ten dollars a week amounts to something, but of course, that was not the main objective, because I had a salary, and I could have gotten along, with difficulty.

[fol. 87] Q. And you had gotten along, of course, for many years before you married Mr. Lucus?

A. Well, I had struggled along, yes.

Q. How much were you earning at the time you married Mr. Lucus?

A. I was earning—well, in 1936, let's see—that was before the war—I was getting about $1440 per annum.

Q. And do you know what you were getting per annum in 1943?

A. Well, as you work in the Federal Service you get automatic raises, and then all during the war of course we worked——

The Court: 1943?

A. What I made in 1943?

Mr. Nebeker: Yes.

A. It averaged up to $1800 per annum.

Mr. Nebeker:

Q. At that time?

A. Yes.

Q. Mrs. Lucus, there were no children ever born of the marriage between yourself and Mr. Lucus?

A. No, sir.

Q. This document that I hand you, Mrs. Lucus, is the original deposition, that I have just taken from the court's files, the original of the deposition given by you in Los Angeles before you came to Salt Lake for the trial of this case?

A. Yes, sir.

Q. I would like you to turn to Page 9 of that deposition, and at line 7 I will ask you to check on the reading of this question by Mr. Collins and the answer that you gave: (Start with Line 5) "A. We were married in 1936, and his income in 1937 and 1938 averaged about $165 a month." That is the correct answer as I have read it?

A. Yes, sir.

Q. That is correct as I have read it from the deposition, isn't it?

[fol. 88] A. Yes, sir; that is what it says here.

Q. Question, by Mr. Collins: "Q. Out of which he contributed the amount that you stated, from $50 to $60 a month, for the support of both of you?" Answer: "Yes." That is correct as it appears in the deposition?

A. Approximately that amount, yes, sir.

Q. Well, that is correct as it appears in the deposition; that is a simple question?

A. Yes.

Q. Now calling your attention to Page 22, starting with Line 6, Mr. Collins asked you this question: "Q. Did you at any time subsequent to the time of the order in January attempt to bring him before the court to show cause or rea-

son why he hadn't paid you the $10 per week?" Is that correctly read?

A. That is correctly read.

Q. And your answer is "No, sir"?

A. Correctly read.

Q. And Mr. Collins asked this question: "Q. Just so we will be sure; he made no payments at all under the order?" Answer: "A. Positively no payments under the order, no." That is correctly read from the deposition that you gave, isn't it?

A. Yes, sir.

Q. Then calling your attention to Page 28 of the Deposition, Line 10,—Mr. Collins asked you this question: "Q. After your husband's demise as a result of this accident, did you incur any expense with reference to his burial?" Is that correctly read?

A. Yes, sir.

Q. Answer: "A. I gave his mother the opportunity to bury her son—the cemetery and the services—to take care of that to her liking, and in so doing she incurred the expense." Is that correctly read?

A. Yes, sir.

Q. Question: "Q. Did she pay it?" Answer, by the wit- [fol. 89] ness: "A. It was paid, but I don't think she paid it." Question: "Q. Have you any idea who paid it?" Answer: "A. Well, it probably was some of his friends. The Isbel Funeral Directors—it was someone here— they collected it from Los Angeles." Is that correctly read?

A. Yes, sir.

Mr. Nebeker: That is all.

Redirect examination.

By Mr. Black:

Q. And, continuing on the same page, Line 21, Page 28; is this a part of the deposition: Question "Q. Did they present a bill to you? A. I have not received a bona fide statement. Q. Have they presented a bill to you? A. No, they did not." Is that a part of the deposition?

A. That is right.

Mr. Black: That is all.

Mr. Nebeker: That is all.

[fol. 90] STIPULATION RE EXHIBITS

Mr. Nebeker: We have certain stipulations.—

Mr. Ray: Mr. Nebeker, you have some photographs of this, which you have submitted to Mr. Black?

Mr. Black: I have seen them.—I assume the photographs were taken shortly after the accident?

Mr. Turner: They were taken next day.

Mr. Nebeker: They have the identification information on the back.

Mr. Black: We have no objection to any of the photographs, your Honor, and they may be received in evidence so far as we are concerned. We will stipulate the information on the back of each.

[fol. 91] Mr. Nebeker: That they show the scene of the accident on the 25th of May, the day following the accident, and that the information on the back shows the direction in which the camera was facing?

Mr. Black: Yes, we will stipulate those facts, your Honor.

Mr. Nebeker: They can be marked as an exhibit.

Mr. Black: Yes; I think that would be better.

(Photographs marked as one exhibit.)

Mr. Ray: To save the production of a witness on this subject, Mr. Black, would you be willing to stipulate that the cars on this train, First 582, were approximately 45 feet in length?

Mr. Black: That is, from coupler to coupler, throughout the train?

Mr. Ray: Yes.

Mr. Black: We will stipulate.

Mr. Ray: Would you be willing to stipulate, Mr. Black, that Mr. J. A. King, who is in the courtroom, if he were sworn and testified would testify that the motor car upon which Mr. Lucus was riding at the time of his death was equipped with 14-inch wooden wheels, with metal tires; that it was a one-cylinder motor; that it was powered for a maximum speed of 25 to 30 miles an hour; that it was equipped with brakes, which would stop the car on a level track, at maximum speed, within 100 feet; that the brakes immediately before the accident were in good condition?

Mr. Black: It is so stipulated, Mr. Ray.

Mr. Ray: I want to place in the record, if the Court please, certain of the Rules of the Company which were in

effect on May 24, 1944, governing the use of track cars. Mr. Black has an objection.

Mr. Black: I object to the Rules, on the ground they are incompetent, irrelevant, and immaterial, in view of the fact that this action was brought under the Power Brake [fol. 92] Act, Section 1, of Title 45, U. S. Code Annotated. Subject to that objection, I have no contention that the Rules were not promulgated and in full force and effect at the time of this accident.

The Court: It may be received.

Mr. Ray: I now read to the jury Rule 1112: "When following moving trains, track cars must remain not less than 400 feet to the rear of same, and shall not stop within 200 feet of standing trains. When running, the distance between individual track cars, or between groups of coupled track cars, must not be less than 500 feet. When stopping, the car or group of cars in advance must give signal to the following car."

(Mr. Ray, Continued. Reads No. 1119:)

"Track cars must not under any circumstances be operated at a speed in excess of 15 miles per hour, nor over road crossings at speed in excess of 4 miles per hour; and after dark or through stormy or foggy weather when visibility is poor, speed shall be reduced to the absolute minimum consistent with safety. A constant and vigilant lookout must be maintained and speed controlled approaching interlocked derails and switches or those operated by remote control, so that stop can be made to avoid accident in the event the route is unexpectedly changed. Before rounding sharp curves or through tunnels and snowsheds where view is obscured, flagman must be sent ahead for protection, if it cannot otherwise be positively determined that way is clear.

I am willing to stipulate with Mr. Black that these track cars do not activate the block-signals.

Mr. Black: It is so stipulated.

Mr. Ray: I will now read to the jury Rule 1120: "Although block signals and indicators for track cars may indicate that a block is not occupied by a train, operators of track cars must bear in mind that an approaching train may immediately thereafter enter the block, or that another track car may at any time be encountered; and further that lineups obtained from train dispatcher cannot always be

[fol. 93] depended upon by reason of conditions unexpectedly changing in the meantime."

When I refer to "track car" I mean the motor car upon which Mr. Lucus was riding. Would you mark this?

(Pamphlet marked as Defendant's Exhibit No. 3.)

Mr. Black: Are those all the rules?

Mr. Ray: I am having this little book marked. Those are the rules I am interested in.

Mr. Black: May the record show that my objection goes to each rule and each part of a rule, on the ground that our action is founded under the Safety Appliance Act, and therefore the rules are immaterial.

Mr. Ray: We offer the book.

The Court: It may be received in evidence.

Mr. Black: I make the same objection, and we further object to every other part of the rules and book as being immaterial.

Mr. Ray: As far as I can tell, there is nothing else in there that relates to this.

Mr. Nebeker: The defendant rests, your Honor,—and we have a motion to make.

(Thereupon counsel for defendant made a Motion for Directed Verdict hereinabove set forth.)

(Thereupon the Court granted defendant's Motion for a Directed Verdict as herein set forth in full.)

[fol. 94] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 95] EXHIBIT "B"

1-39 CS 2957

(AX) Telegraphic Report of Accident

Instructions:—Use Signal "AX" to indicate to Receiving Operator to copy on Form 2979. This Signal gives precedence over other telegrams. Operators in transmitting will send NUMBERS and ANSWERS only.

From—Lakeside. Time—M. Date—5-24-1944.
To: All Concerned, Ogden.
1. Date, time, weather—5-24-44. 3:40 p.m. Clear.
2. Near M. P. and station—704; near Lemay, Utah.

3. Curve or straight track, ascending or descending grade—Straight, level.

4. Train—1-582. Engine—3730. Conductor—D. E. Jorgensen. Engineer—A. D. Miller.

5. Speed of train—Stop-ed.

6. Kind of accident—Motor car run into rear of train. How many cars derailed—None.

7. Cause of accident—Train stop-ed in Emergency Acct. Broken Branch pipe and motor ran into rear of train.

8. Persons injured; name, occupation if employee, nature of injuries and days disability—Frank Lucus, killed; Alvin Lynch, Head injury & shattered arm.

9. If passenger, destination or stopover where interview may be had—

10. Disposition made of injured persons—Put on No. 28 at Newfoundland and sent to Ogden.

11. Help required—None.

12. East or west end of train—West.

13. Kind and quantity of track, car, bridge or other material required—None.

14. Is main track obstructed—No.

15. How long to clear main track—

16. Is there a siding on which trains can pass—

17. Will temporary track have to be constructed—No.

18. Delays to trains—32 min. 1-582.

19. Damage to track—None.

[fol. 96] 20. Damage to engine—None.

21. Is engine derailed—No.

22. Damage to cars: car number, location from head end, contents (if empty so state); destination, waybill reference, damage to car, damage to contents, state which if any will have to be transferred, and which cars derailed—P.F.E. 29435; 60th car from headend; Lettuce for Omaha; Broken Branch Pipe; No damage to contents; Cab 216, Broken Air Hose & Angle Cock; Motor Car @ PM 2668, Demolished.

23. Name and address of eye-witnesses of grade crossing accident—

24. Remarks: Train stop-ed in Emergency Acct. Broken branch pipe on P.F.E. 29435, Men on motor car run into train.

(Signature) D. E. Jorgensen. (Occupation) Condr.

[fol. 97] EXHIBIT 3

SOUTHERN PACIFIC COMPANY

Rules Governing Operation of Track Cars

Issued September, 1944

1112. When following moving trains, track cars must remain not less than 400 feet to the rear of same, and shall not stop within 200 feet of standing trains. When running, the distance between individual track cars, or between groups of coupled track cars, must not be less than 500 feet. When stopping, the car or group of cars in advance must give signal to the following car.

1119. Track cars must not under any circumstances be operated at a speed in excess of 15 miles per hour, nor over road crossings at speed in excess of 4 miles per hour; and after dark or through stormy or foggy weather when visibility is poor, speed shall be reduced to the absolute minimum consistent with safety. A constant and vigilant lookout must be maintained and speed controlled approaching interlocked derails and switches or those operated by remote control, so that stop can be made to avoid accident in the event the route is unexpectedly changed. Before rounding sharp curves or through tunnels and snowsheds where view is obscured, flagman must be sent ahead for protection, if it cannot otherwise be positively determined that way is clear.

1120. Although block signals and indicators for track cars may indicate that a block is not occupied by a train, operators of track cars must bear in mind that an approaching train may immediately thereafter enter the block, or that another track car may at any time be encountered; and further that lineups obtained from train dispatcher cannot always be depended upon by reason of conditions unexpectedly changing in the meantime.

[fol. 98] IN DISTRICT COURT OF WEBER COUNTY

PROPOSAL FOR SETTLEMENT OF BILL OF EXCEPTIONS—July 2, 1946

Come now the attorneys of record for the plaintiff above named and propose and offer to the Court as Plaintiff's Bill of Exceptions in the above entitled cause the following: The transcript of the proceedings duly certified to by Simon Barlow, the Official Court Reporter, contained in the within Bill of Exceptions on pages numbered from 1 to 96, both numbers inclusive, on the last page of which appears the Certificate of the Official Court Reporter, and the exhibits referred to in said Bill of Exceptions and identified by marks made by the Clerk of the Court as follows:

Exhibit A, a map,
Exhibit B, Copy of Report,
Exhibit C, Accountant's Statement,
Exhibit D, a Stipulation,
Exhibit 1, Copy of divorce proceedings,
Exhibit 2, Photographs,
Exhibit 3, Railroad Rules,
Exhibit 4, Personal Records,

and said counsel certify and declare that said proposed Bill of Exceptions constitutes and sets forth accurately and completely all of the evidence introduced, proceedings had, objections made, exceptions taken, and orders, motions or rulings occurring, noted or made during the trial of the above entitled case.

Dated, this 2 day of July, A. D. 1946.

Rawlings, Wallace & Black, Clyde and Coray, Attorneys for Plaintiff.

[fol. 99] IN DISTRICT COURT OF WEBER COUNTY

ORDER SETTLING BILL OF EXCEPTIONS—July 8, 1946

Honorable John A. Hendricks, Judge of the Second Judicial District Court in and for Weber County, State of Utah, who sat as trial judge of the above entitled case, hereby certifies that the Bill of Exceptions proposed by attorneys for plaintiff, consisting of Bill of Exceptions in the case of Howard F. Coray, Ancillary Administrator of the Estate

of William Frank Lucus, Deceased, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant, consisting of 96 pages, on page 96 of which appears the Certificate of Official Court Reporter, Simon Barlow, dated May 17, 1946; and the Exhibits referred to in said Bill of Exceptions and identified by marks made by the Clerk of the Court, as follows:

Exhibit A, a map,
Exhibit B, Copy of Report,
Exhibit C, Accountant's statement,
Exhibit D, a Stipulation,
Exhibit 1, Copy of divorce proceedings,
Exhibit 2, Photographs,
Exhibit 3, Railroad Rules,
Exhibit 4, Personal Records,

constitute and set forth accurately and completely all of the evidence introduced, proceedings had, objections made, exceptions taken, orders, motions and rulings occurring, noted or made during the trial of the above entitled case, and subsequent thereto, and it appearing that the Bill of Exceptions was duly served upon attorneys for the defendant on the 2nd day of July, A. D. 1946, and that said defendant had waived time within which to propose amendments thereto and have consented that said proposed Bill of Ex-
[fol. 100] ceptions might be presented forthwith to the undersigned Judge without further notice to said defendant, and approved and settled by the Court if the Court should be of the opinion that the said proposed Bill of Exceptions is in all respects true, accurate, correct and complete, and the Court being of the opinion that said Bill is in all respects true, accurate, correct and complete, the same are hereby settled and allowed as the Bill of Exceptions in the above entitled case.

Dated, July 8, A. D. 1946.

John A. Hendricks, District Judge.

Attest: Lawrence M. Malan, Clerk, by Agnes S. Crites, Deputy Clerk.

[fol. 101] Acknowledgment

Comes now the defendant, by and through its attorneys of record, and hereby acknowledges service upon them of Plaintiff's proposed Bill of Exceptions herein and said defendant, by and through its attorneys, does now hereby waive time within which to propose amendments to said Bill of Exceptions and consents that the said proposed Bill of Exceptions may be presented forthwith to the Judge who tried and heard the said case without further notice to the defendant.

The defendant expressly reserves all rights it may have to question the timeliness within which said Bill of Exceptions was served, filed or settled and to present any claim or contention which it may have with respect to the propriety of the service and settlement of said Bill of Exceptions.

Dated, July 3, A. D. 1946.

Ray, Quinney & Nebeker, Attorneys for Defendant.

Filed after settlement on July 8, A. D. 1946.
Lawrence M. Malan, County Clerk, by Agnes S. Crites, Deputy.

[fol. 102] In the Supreme Court of Utah

Appellant's Statement of Errors Relied Upon for Reversal—Filed August 9, 1946

Point I

The Court by its ruling denied plaintiff the right of trial by jury contrary to applicable and controlling federal statutes and decisions.

Point II

Defendant's violation of the Safety Appliance Act contributed in whole or in part to cause the death of William Frank Lucus and the Court therefore committed error in taking the case from the jury.

Point III

Defendant's violation of the Federal Safety Appliance Act having contributed to cause the death of William Frank Lucus, his negligence was immaterial.

Point IV

The Court erred in holding that Lucus was not within the protection of the Act at the time of his death.

[fol. 103] In Supreme Court of the State of Utah

No. 6967

Howard F. Coray, Ancillary Administrator of the Estate of William Frank Lucus, dec'd., Plaintiff and Appellant

v.

Southern Pacific Company, Defendant and Respondent

Opinion—Filed October 31, 1947

McDonough, Chief Justice:

The trial court directed a verdict against the plaintiff administrator in an action against the railroad for alleged wrongful death, and plaintiff appeals. There is no serious dispute as to the facts. Plaintiff contends that the death resulted from negligence in alleged violation of the Safety Appliance Act, while respondent contends that the decedent was furnished with a safe appliance and mechanism, and that the death of decedent was proximately caused solely by his own heedless conduct in running into the caboose of a freight train which had come to an emergency stop.

On May 24, 1944, decedent and one Lynch waited for eastbound freight-train No. 1/582 to pass, which was required to take the next siding east of Newfoundland to permit west bound passenger train 587 to go through on the main line. Lucus was in charge of a track car and he had some pay checks to take to the men at the next station. Lucus and Lynch pushed the motor track car onto the track behind the freight train and proceeded to follow the train which was scheduled to go onto the next siding. There was a company rule in effect which required operators of track cars to keep such cars at least 400 feet from rear of the train. Such track car could be operated at a speed of not to exceed [fol. 104] 35 miles per hour and at such speed could be stopped within a distance of 100 feet. When the track car was started, it was about 900 to 1200 feet behind the freight

train. Both the freight train and the track car were traveling toward the approaching passenger train. Decedent operated the track car, and both he and Lynch faced the west instead of the direction toward which they were moving. With their backs toward the east they in effect were traveling backwards.

When the freight train was about ¾ of a mile east of Lemay, Utah, it came to an emergency stop before it reached the siding. The train being equipped with air brakes, came to a sudden but easy stop by reason of the fact that the triple union nut became disconnected from the triple-valve on the 60th car from the engine, which disconnection was due to the threads on the triple valve being worn. As a result of the triple union nut becoming disconnected from the triple-valve, it permitted the air to escape from the air-line and to set the brakes in emergency.

There was no jerking, and it required about 1350 to 1800 feet distance to complete the stop. The braking system is so designed that such event will occur when the air is released, air-pressure being essential to release the brakes and to keep them released. The conductor noticed that there was an emergency stop, and one witness stated that it appeared that the engineer had decided that he could not make it to the siding. When attention was called to the air-gauge, it was noted that it registered zero, which meant that the air had been released. Just at that moment, one of the men in the caboose observed decedent and Lynch on the track car with their backs to the train which they were approaching, about three car lengths or about 150 feet to the rear. Some attempts were made to signal to these men on the track car, but such efforts were in vain in consequence of the failure of the men on the track car to face the direction in which they were moving and also by reason of the noise of the motor. The track car crashed [fol. 105] into the rear of the caboose, throwing off both men and in consequence of such collision decedent was killed. Lynch received injuries, but they were not fatal.

At the outset, we are confronted with a motion on behalf of respondent to strike the bill of exceptions on the ground that it was not settled in time, and also, a motion to dismiss the appeal, inasmuch as it was filed more than 90 days after entry of judgment.

The judgment on the verdict was entered April 6, 1946. Notice of appeal was served on July 3, 1946, but it was not

filed with the clerk until July 6th, which was 91 days after entry of judgment. However, there appears in the record an order dated July 1, 1946, denying a motion for new trial. That a motion for a new trial, seasonably made, suspends the finality of a judgment until the court's ruling thereon, (Fuller v. Ferron, et al., 51 Utah 105, 168 P. 1179, and cases there cited), is conceded by respondent. Likewise, the statutory time allowed for settlement of a bill of exceptions, in cases in which a motion for a new trial is interposed, runs from notice of the ruling on such motion. Sec. 104-39-4, U. C. A. 1943.

But respondent apparently takes the position that the record on appeal must affirmatively show that the motion for a new trial was made within the time allowed by statute or such extensions thereof as may have been granted by the trial court. The papers filed in this court contained a motion by appellant to be relieved of his default in failing to timely serve notice of motion for a new trial, together with supporting affidavits and an order of the trial court granting the relief prayed. These were not incorporated in the bill of exceptions and respondent contends that they are not included in the judgment roll. Appellant argues that they are. Without discussing the cases cited by respondent in support of its contention, we shall assume that they are not and are hence not before us on appeal.

[fol. 106] We have, therefore, a record which discloses the date, indicated hereinabove, upon which the motion for a new trial was overruled, the order overruling such motion being a part of the judgment roll, and which reveals that the appeal was taken and the bill of exceptions served within the time allowed by statute. Was it incumbent upon appellant to show by the record that the motion so overruled was timely made? We think not. If the contrary be held, then in the case of every appeal which an appellant desires to predicate on the judgment roll without an extended bill of exceptions, it would be necessary to settle a bill containing merely the date upon which the motion for a new trial was made. The statutes do not so provide, nor do principles of appellate procedure so dictate. True, this court will sua sponte take cognizance of its lack of jurisdiction. Furthermore, the record before us must show jurisdiction. The record does so show when it reveals that notice of appeal was served and filed within 90 days after the date

of an order overruling a motion for a new trial. This prima facie showing of jurisdiction may, of course, be negatived by other parts of the record. Thus, if the bill of exceptions contains the motion for a new trial exhibiting that it was not timely filed, lack of jurisdiction is shown, unless there is also evidenced by such record a timely extension of time for filing the motion or an order relieving appellant of his default in failing to move in time.

The cases cited by respondent are not to the contrary. In Progress Spinning & Knitting Co. v. Dixie Fire Ins. Co., 43 Utah 303, 134 P. 1166, the record affirmatively showed that the notice of intention to move for a new trial was given twenty days after judgment and there was no claim that appellant had been relieved from his default in failing to file the same in time. Under those circumstances we held that we could not assume that appellant had been relieved [fol. 107] from his default in the absence of a showing that the motion for new trial was not in fact overruled because it was not filed in time. To the same effect is Felt v. Cook, 31 Utah 299, 87 P. 1092. In those cases the record disclosed the time when notice of intention to move for new trial was served. In Warnock Ins. Agency v. Peterson Inv. Co., 35 Utah 542, 101 P. 699, the notice of appeal was served more than six months after judgment, (the time then allowed for taking an appeal being six months). There, as here, the notice of intention to move for new trial, motion for new trial and order overruling the same were attached to the judgment roll, but not made a part of the bill of exceptions. At that time the statute did not make the order overruling the motion for new trial a part of the judgment roll. We held that the record respecting the motion for new trial was not a part of the judgment roll, and therefore not before us on appeal. Hence, we could not consider the same and the appeal was dismissed.

Respondent points out that appellant concedes in his brief that the notice of motion for a new trial was not served and filed within five days after entry of judgment. However, this concession is made as a preface to his argument that the motion to be relieved of default and the order made pursuant thereto are properly before us in the judgment roll. The mere exhibition of these documents would reveal that the notice of motion for a new trial was not filed within five days after entry of judgment, but if they may not be considered for the purpose of showing the order

relieving of default, because not properly a part of the record, neither may they be regarded to show the default itself. The concession in the argument made in effect in connection with the proffer of the documents in question should be disregarded as well as the documents themselves. The motion to dismiss the appeal and the motion to strike the bill of exceptions are denied.

[fol. 108] We are next met by the contention of respondent, to the effect that since no exception was expressly taken to the order directing the verdict for defendant, the alleged error of the trial court in directing the verdict cannot be reviewed by this court, citing Stewart v. O. S. L. R. R. Co., 39 Utah 375, 117 P. 465. In that case plaintiff sought to recover damages for personal injuries and the court directed a verdict in favor of the defendant. No exception was expressly taken to the ruling, but appellant contended that under the statute then in effect pertaining to exceptions, such a ruling was deemed excepted to by statute. This court construed sec. 3283, C. L. 1907, which with subsequent amendments is now sec. 104-39-2, U. C. A. 1943. Such section, with the amendments made since 1907 italicized, reads as follows:

> "The verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision finally determining the rights of the parties or some of them, an order or decision from which an appeal may be taken, an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading or a portion thereof, or refusing a continuance, *an order granting or denying a motion for nonsuit,* an order made upon ex parte application, an order or decision made in the absence of a party, *and all rulings on objections to, or motions to strike out, evidence,* are deemed excepted to."

In the Stewart case this court held that inasmuch as the statute as it then existed was identical with sec. 647 of the California Code of Civil Procedure, and the Supreme Court of that state had held that a motion for nonsuit will not be reviewed where no exception was taken to the ruling, a motion for a directed verdict should be considered in the same category although the effect of granting such motion is to terminate the action. This court followed the

rule that an order granting nonsuit will not be reviewed unless an exception is taken, until the statute was amended to specify that an order granting or denying a motion for nonsuit is deemed excepted to. Moapa Garden Co. v. San [fol. 109] Pedro, L. A. & S. L. R. Co., 45 Utah 141, 143, P. 218, and Badertscher v. Independent Ice Co., 55 Utah 100, 184 P. 181.

In Frank v. Myers, (Cal. App., hearing denied by Supreme Court), 60 P. 2d 144, in overruling the contention of respondent that an order of the trial court directing a verdict is not reviewable absent an express exception thereto, the appellate court construed such order as an instruction to which, under the California code, an exception is deemed taken. A further reason for the ruling of the appellate court is thus expressed: "Moreover the record discloses that the instruction to the jury to direct a verdict for defendant was given 'over the objections' of plaintiff. Section 648 of the Code of Civil Procedure provides that 'no particular form of exception is required,' and section 646 of the Code of Civil Procedure provides that 'an exception is an objection upon a matter of law to a decision made, either before or after judgment' ".

While it is true in a sense that the motion for a directed verdict is in the nature of a request for instruction, and that in some instances there is a request for a directed verdict included in proposed instructions, the charge to the jury generally is designed to guide the jury in its deliberations. When the court directs a verdict, it takes the case away from the jury so that the court makes the decision instead of the jury. The jury thereby is shorn of its function as trier of the facts.

We believe that the decision in Stewart v. O. S. L. R. R. Co., supra, examined in the light of the practical operation of court procedure, is illogical. The holding in that case seems to have failed to take into consideration the language of the statute which grants an automatic exception to "the final decision in an action or proceeding, an interlocutory order or decision finally determining the rights of the parties or some of them." An order directing a verdict, leaves nothing to the discretion of the jury and finally [fol. 110] disposes of the case, except for the formal entry of judgment on the verdict, as conceded in the Stewart case. It would be difficult to conceive of a situation in which an order is made which finally determines the rights

of the parties if an order directing a verdict does not do so. If the court directs a verdict when the case should be presented to the jury, the jurors are deprived of serving as triers of the fact.

Since we are dealing with a procedural rule rather than one of substantive law, we are less reluctant to overrule Stewart v. O. S. L. R. R. Co., supra, and to hold that the statute gives an automatic exception to an order or ruling of the court directing a verdict, since the order or ruling constitutes a "decision finally determining the rights of the parties."

In addition to what has been said, there is another reason why a party should not be required to take an express exception to a directed verdict. The purpose of an exception is to furnish a basis for review, and also to first give the trial court opportunity to correct error. When a directed verdict is ordered, it is almost always, as the record discloses it was in this case, after argument, when opportunity has been given to determine the matter with deliberation. The party against whom the verdict is directed has voiced his objection to the order requested.

As triers of the facts, jurors have the right to resolve conflicts in evidence, and to draw reasonable inferences from the facts so found. Jurors sitting as triers of the fact are not empowered to decide legal questions, nor draw any conclusions of law therefrom except as guided by the instructions of the court. If there is no dispute as to the facts, there is no occasion to instruct the jury, for the jurors have no conflict in evidence to determine, and no ultimate facts to find. The only function which would be left to the jury, if the facts were undisputed, and if the facts spelled out liability on the part of the defendant, would be a deter-[fol. 111] mination of the amount of the damages within the limits permitted by the facts.

Proceeding to the merits, the uncontroverted evidence set out hereinabove, shows a violation of the Safety Appliance Act by defendant. A violation of such act imposes liability upon a carrier for any injury to an employee caused "in whole or in part" by such violation. 45 U. S. C. A., Sec. 51. Chicago, B. & Q. Ry. Co. v. U. S., 220 U. S. 559, 55 L. Ed. 282, 31 S. St. 612; St. Louis Iron Mountain & Southern Ry. Co. v. Taylor, 210 U. S. 281, 28 S. Ct. 616, 52 L. Ed. 1061; and Eker v. Pettibone, 110 F. 2d 451, and cases cited. We are thus confronted immediately with the

ultimate question presented on the merits: Was the emergency stop caused by the disconnection of the triple-valve on the car in the manner described a "cause", in whole or in part, of the death of plaintiff's intestate?

The "cause" must, of course, be the legal cause, in order to be the basis of recovery. To show merely that the injury would not have occurred had there been no violation of the act, is not the equivalent of showing that the violation was the cause thereof. "In order to be the legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent . . . The negligence must also be a substantial factor as well as an actual factor in bringing about the plaintiff's harm. The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called 'philosophic sense', yet the effect of many of them [fol. 112] is so insignificant that no ordinary mind would think of them as causes." Restatement of the Law of Torts, Sec. 431, Comment (a).

Applying such criterion to the facts here presented, it is patent that the precise chain of events would have transpired had the train been intentionally brought to an emergency stop because of any of numerous conceivable exigencies. Indeed, had the train been slowed down to a few miles per hour, the same result would, in all likelihood, have eventuated. The leak in the triple valve caused the train to stop, because as a safety device, it was designed to do just that. Hence, cases cited by appellant, such as Spokane & E. I. R. Co. v. Campbell, 241 U. S. 497, 60 L. Ed. 1125, 36 S. Ct. 683, wherein the jury concluded that the air brakes failed to so function as to stop the train, are not in point. The same may be said of Didinger v. Penn. R. R., 39 F. 2d 798, and Lehigh Valley R. R. v. Howell, 6 F. 2d 784.

This is not to say that a defect in the air line which causes the air to be released and the train to be brought to an emergency stop, may not be the legal cause of injuries resulting to an employee. Clearly, it may. Thus, in Minneapolis & St. Louis R. R. Co. v. Gotschall, 244 U. S.

66, 37 S. Ct. 598, 61 L. Ed. 995, where a brakeman, walking along the top of a train of cars was thrown off and killed, when the train separated because of the opening of a coupler on one of the cars, resulting in an automatic setting of the emergency brakes and a sudden jerk; it could not well be said that the failure of the coupler was not the legal cause of the brakeman's death. Likewise, in the case of Chesapeak & Ohio Ry. Co. v. Smith, 42 F. 2d 111, cited by appellant. There the train came to an emergency stop of such violence that it threw the brakeman through the panel of the front door of the caboose, and tore loose the furniture and stove. In such case the immediacy of the result leaves no room for speculation as to its cause.

[fol. 113] But here, the stopping of the train—whether because of the defect in the triple valve, or a proper application of the braking power—was but the creation of a condition upon which the negligence of plaintiff's intestate operated. It was not the legal cause of the result. Had the train been intentionally stopped because of a defective appliance, and the same eventuality had transpired, could it be found that the railroad's violation of the Safety Appliance Act was the legal cause of the death of plaintiff's intestate? Had the engineer of the train noticed a "hot box" and had brought the train to a stop in order to have it remedied, and the track car collided with the train, the defective journal box would have been the *cause* of the stop, but that cause produced a non-negligent condition; that is, a condition or situation which of itself violated no duty owing to the men on the following track car.

Viewed from the standpoint of negligence, the railroad company was not negligent toward plaintiff's intestate in failing to comply with the Safety Appliance Act relative to the locomotive furnished to the crew of the train. Viewed from the standpoint of causation: Looking back from the harm to the actor's negligent conduct, it appears highly extraordinary that the negligent conduct should have brought about the harm. See Restatement of the Law of Torts, Negligence, Sec. 433.

These last statements suggest the contrary approaches of Judge Cardoza and Judge Andrews in Palsgrof v. Long Island R. Co., 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253. Cardoza says the conduct of the defendant guards in pulling and pushing the pasenger with the package, even if negligent in relation to the holder of the package, was not a

wrong toward the plaintiff who was hit by the falling scales. Andrews says the act of the guards was a negligent act, that where there is an unreasonable act, and some right may be affected, there is negligence whether damage does [fol. 114] or does not result. Hence, he says, the case must be resolved on the question of proximate causation, and concludes that it cannot be said as a matter of law that the action of the guards was not the proximate cause of plaintiff's injuries.

So in the instant case the question of liability may be considered as a question of whether there was any breach of duty on the part of the railroad to plaintiff's intestate, rather than a question of proximate cause. Did the defendant by furnishing the train crew with a train on which there was a leaky air valve, violate any duty it owed to Lynch and Lucus? The answer may be sought, we think, by inquiring what is the objective of the Safety Appliance Act which requires such a train to be equipped with proper air brakes which shall be at all times kept in working order? What is the purpose of such brakes? Solely, to stop the train. The provisions of the act are for the purpose of protecting those—the crew of the train and others, whose safety would be endangered if the train could not be stopped; not of protecting other employees *because* the train was stopped by the brakes.

Indeed, the very design of the required braking device emphasized—if emphasis were needed—the safety objective of the provision relative to brakes. Were air brakes systems so designed that air pressure would be required to apply the braking mechanism, a break in the air line might not be discovered until an attempt to stop the train were made. But designed as they are to set the air brakes when the air is released, a leak in the air line stops the train and prevents it being moved until the leak is repaired. So in some sense the required safety device worked as it was designed to work—the leak stopped the train, thereby advising the crew of the condition. True, there was a defect in the air line—such a defect as would prevent the movement of the train. But the objective of the statute, insofar as brakes might be concerned, is not to protect employees from standing, but from moving trains.

[fol. 115] Cases cited by appellant to the effect that the question of causation is one for the jury, where the evidence relative thereto is in conflict, or where different inferences

may be drawn from established facts, are not helpful. (See Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409). Here, there is no conflict in the evidence, nor, in our opinion is there a basis for any inference upon the part of the jury that the violation of the Safety Appliance Act was a cause "in whole or in part" of the death of plaintiff's intestate.

"While the Federal Employers' Liability Act (45 U. S. C. A. sec. 51-59) has relaxed the (common law proximate causation) rule, it has not so far done away with it as to hold an employer in damages if there is no other connection between the negligence and the injury than that if there had been no neglect, there would have been no injury, i. e., there must be more in the case than that the negligence preceded the injury, and created a situation in which the accident, otherwise caused, resulted; there must be some degree of causation established before there may be a recovery." Southern Pacific Co. v. Ralston, 67 F. 2d 958, 959. And see, Anna Lang, Admin. v. New York Central R. Co., 255 U. S. 455, 65 L. Ed. 729, 41 S. Ct. 381.

From what has been said, it followed that the court below did not err in directing a verdict for defendant. The judgment is affirmed. Costs to respondent.

We Concur:

Eugene E. Pratt, Justice; Lester A. Wade, Justice.

WOLFE, Justice (concurring in part—dissenting in part):

I concur in the denial of the motions to dismiss the appeal and to strike the bill of exceptions. I also concur in the holding that an order directing a verdict for the defendant [fol. 116] (I think it unnecessary to determine what would be the case where the verdict is directed for the plaintiff) is deemed excepted to. I am in general accord with the reasons given in the opinion for these conclusions.

As to the merits, I think the decision of the Supreme Court of the United States in Pauly v. McCarthy, 67 S. Ct. 962, points to a different conclusion. In the Pauly case this court concluded that *under the evidence* no jury question was presented as to whether the passing track segment of the railroad where Pauly's train pulled in to make an adjustment was a place of work. We concluded that there was

no evidence that the employees were required to make inspections there or that they did so. It was concluded that for purposes of such repairs the passing track must be considered no different from any *other* part of the main track where in the event of an emergency, such as a break-in-two, repairs might have to be made at the point where the breakdown occurred because the passing track would be too far away that the use of a passing track where the situation was such as to permit the reaching of the same was for the purpose of permitting traffic to proceed and for better convenience of working but that if the situation permitted the use of a passing track for repair purposes of this sort rather than its real purpose of allowing trains to pass, it would be by chance that it could be so used; that logically, therefore, repairs enabled by chance to be made at the passing track must be considered like those required to be made any where along the shoulder of the road where they happened to occur, and if the passing track were itself considered a place to work the logical result would be that all of the shoulder of the railroad line would be a place to work.

We thought that to hold the entire shoulder of the railroad as a place to work regardless of any functions, frequent or otherwise, to be performed there, might require railroads to spend millions of dollars in widening the [fol. 117] shoulders on every cut and fill so that an employee might safely drop off without first looking. For if there was a duty to build a flooring over a bridge at a passing track where an employee might by chance be required to make repairs in order to prevent an employee not exercising proper care from going down through the bridge, there would be a similar duty to widen every fill so as to prevent an employee, carelessly alighting, from sliding down the side of a fill where the sides were steep.

While we have not had the benefit of an opinion of the United States Supreme Court as to the reasons for its decision, we may assume that it concluded from the evidence that in law the passing track was a place to work, or at least that, under the evidence, whether the passing track was a place to work was for the jury. Evidently we were in error in concluding that in law it could not be considered a place to work. However, in the second part of the majority opinion in the Pauly case it was held *that even if the passing tracks were held to be a place to work the sole legal cause of the injuries of Pauly was his negligence.* In order

to reverse, the Supreme Court had to hold that such was not the case.

We may now parallel the two cases so far as profitable. Pauly was the sole cause of the initiation of his career of mishap. The train had come to a dead stop. He was not jerked off the car. He intentionally and deliberately dropped off without looking. His negligence consisted in failing to use the lantern on his arm to acquaint himself with the nature of the terrain beneath him. Nothing that the railroad did acted on him to initiate his fall or direct its course, nor to aggravate or contribute to its force or divert his course to his detriment. When he voluntarily abandoned the supporting force of the step, by dropping therefrom, gravity became the sole substantial operating force. The negligence of the railroad in the Pauly case must have been in not apprehending that an employee while engaged in the employer's business might have a lapse, [fol. 118] and in not building a board walk or balustrade to save him from the effect of that lapse by interrupting his fall, or in not furnishing the bridge with warning lights which supposedly would have prevented the lapse. In the Pauly case there was a rule which, as pointed out in our opinion, was not for the dispatch of traffic or its safety but was for the very protection of the employee himself—the rule being that before alighting he should look and ascertain where he was stepping.

In the instant case there was a rule that track cars should stay at least 400 feet behind the car of the train they followed. This rule was undoubtedly for the safety of the track car crew and for the safety of the train for in this case traffic or train movement was involved.

In the instant case the track car employees failed to keep a lookout. In that they were negligent. But the railroad was negligent by statute in furnishing a car with a defective triple valve. By reason of this negligence of the railroad, the train became an obstacle in the course of the track car— a delict of commission as the lack of an obstacle to save Pauly from the effect of his negligence was a delict of omission. The negligence of Lucus and his fellow employee in failing to keep a proper lookout, concurred with the negligence of the railroad, thus causing the accident, just as Pauly's negligence in stepping down without looking, *together with* the negligent omission of the railroad in failing to place an obstacle to interrupt his fall at approxi-

mately the track level, caused his (Pauly's) injury. If it were not for the action of the Supreme Court in reversing Pauly v. McCarthy I would entertain less doubt as to the correctness of the majority opinion in the case.

If the omission of the railroad in the Pauly case reasonably to apprehend the lapse of an employee and to construct a surface which would save him from the injuries conse- [fol. 119] quent to that lapse or to install lights designated to prevent such lapse, coupled with Pauly's negligence, caused the injury in that case, then it is arguable that, by the same token, or *a fortiori* in this case, the negligence of the railroad in furnishing a car with a defective brake valve coupled with the negligence of Lucus in not keeping a lookout ahead, concurred in causing the injury and made both negligences the combined legal cause of the injury. And if this is so, since contributory negligence is no defense, the question of the plaintiff's damages in this case is a question for the jury.

In this case, is not the omission of the railroad to furnish a good air brake thus causing an obstacle to wit, a freight train, to be suddenly interposed in the course of the track car on which Lucus was riding, coupled with the negligence of Lucus in not looking ahead, just as much the legal cause of the impact which caused his death as was the omission of the railroad in the Pauly case to place lights and a platform on the bridge the legal cause of Pauly's fall to the creek bottom and hence the legal cause of the injuries due to such impact? Is there any real difference for the reason that in one case the impact was because an obstacle was negligently interposed, which, coupled with the negligence of Lucus, caused the injuries, whilst in the other case an obstacle was negligently not interposed which coupled with Pauly's negligent failure to look caused Pauly to suffer a violent impact which caused his injuries?

Of course, the Coray and the Pauly cases are not similar, much less identical, in their facts. The above paralleling process applies only to underlying reasoning.

As stated in the prevailing opinion, there is no dispute that the Safety Appliance Act was violated by the defendant, and the only questions are whether or not the furnishing of the train with a defective triple valve was the proximate cause of decedent's death, and whether the track crew [fol. 120] were within the class which the act was designed to protect. I agree with the majority opinion that the

"cause" must be the legal cause, and not a mere philosophical cause, or sine qua non cause. But in order for an act or event to be the legal cause it need not necessarily be the sole cause. It is sufficient if it is a substantial causative factor, and not too remote. The fact that other acts or events concurred in producing the injury, does not make the negligent act any the less the legal cause, unless the other acts or events were independent and superseding, so as to break the original chain of causation and set forth a new one.

I cannot agree that the stopping of the train by reason of the defective triple valve was but the creation of a condition upon which the negligence of plaintiff's intestate operated. If the engineer had deliberately, in a spirit of horseplay, "big-holed" the airbrakes, and Lucus had collided with the train which was thus suddenly halted, I think there would be no doubt that the negligence of the engineer in suddenly stopping the train without reason, would be the proximate and legal cause of any injury to Lucus. I cannot see that the sudden stopping of the train due to the defective air brake was any the less the cause of the death of Lucus in this case.

Of course, if the train had not come to a stop because of the results of a leaky brake valve but because of an intended release of air due to an emergency then there would have been no negligence on the part of the railroad under the Safety Appliance Act and hence the sole cause of Lucus' injury would have been his failure to look and keep more than 400 feet from the rear of the train. And if the train had come to a stop by reason of a leaky brake valve and later, after it had been stalled for some time, a track car had hit it due to a failure of employees manning the track car to keep watch, I would conclude that the leaky brake [fol. 121] valve was too remote a cause and therefore not proximate. But in this case the stopping of the train and the impact of the immediately following track car are bound together in point of time and event as a unit happening.

The prevailing opinion cites the interesting and informative debate between Justices Cardozo and Andrews in the famous case of Palsgraf v. Long Island R. Co. (N. Y.) 162 N. E. 99. As with many students of the law who have studied the opinions of the two very able and learned judges in that case, I have some difficulty in seeing any negligence on the part of the railroad when the guards apparently

acted to insure the safety of the passenger. But to have held categorically that there was no negligence, would have deprived the legal profession of two very valuable and learned essays on the law of negligence and causation. Mr. Justice Cardozo, and a majority of the court, held that the conduct of defendant's servants was not negligent *as to plaintiff*. I shall discuss hereafter the question of whether or not the furnishing of a defective brake valve by the defendant in this case was negligent as to Lucus, or in other words, whether Lucus was within the class protected by beneficient provisions of the Safety Appliance Act. For present purposes, I do not think the opinion of Mr. Justice Cardozo is of any assistance in this case.

Mr. Justice Andrews, in his dissent, adopted the theory of "negligence in the air." That doctrine is generally without support in the cases from the American jurisdictions, and certainly is not followed by this court. But having determined the question of negligence in favor of the plaintiff, Justice Andrews proceeded to deliver an excellent exposition of the law of legal causation. Although lawyers and courts may differ as to the applicability of the principles there announced to the facts of the Palsgraf case, [fol. 122] or to any given set of facts, I think the principles set forth, as abstract propositions, are generally accepted by the courts of this country and are firmly embedded in American jurisprudence.

The general rule is stated thus by Mr. Justice Andrews at p. 103:

> "The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former.
>
> "These two words have never been given an inclusive definition. What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations, as does the existence of the negligence itself. Any philosophical doctrine of causation does not help us * * * You may speak of a chain, or if you please, a net. An analogy is of little aid. Each cause brings about further events. Without each the future would not be the same. Each is proximate in the sense it is essential. But that is not what we mean by the word. Nor on the other hand do we mean sole cause. There is no such thing."

And again:

> "What we do mean by the word 'proximate' is that, because of convenience, of public policy, or a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."

And further on page 104:

> "The proximate cause involved as it may be with other causes, must be at the least, something without which the event would not happen. The court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the normal judgment of mankind, to produce the result? Or, by the exercise of prudent foresight, could the result be foreseen? Is the result too remote from the cause, and here we consider remoteness in time and space • • • We draw an uncertain and wavering line, but draw it we must as best we can.
>
> "Once again it is all a question of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."

[fol. 123] Respondent has cited, and finds comfort in the cases of St. L. & S. F. R. Co. v. Conarty, 238 U. S. 243, 59 L. Ed. 1290, and Lang v. N. Y. Central R. R. Co., 255 U. S. 455. In the Conarty case an employee of defendant railroad standing on the footboard of a switch engine was injured when the engine backed into a car not equipped with an automatic coupler and drawbar as required by the Safety Appliance Act. The engine was not engaged in a coupling operation at the time of the collision. The Supreme Court of the United States, in denying recovery, held that plaintiff was not within the class of persons protected by the act. In the Lang case a railroad employee was fatally injured when a freight car upon which he was riding, and which it was his duty to stop by use of a hand brake, collided with a crippled car not equipped with an automatic coupler and

draw bar, and he was caught between the two cars. Had the crippled car been equipped with a coupler and draw bar, there would have been sufficient space between the two cars so that decedent would not have been caught between them. The court held that the absence of the coupler and draw bar was not the proximate cause of the injury.

These two cases were distinguished from Louisville & N. R. R. v. Layton, 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931, and Minneapolis R. R. v. Gotschall, 244 U. S. 66, 37 S. Ct. 598, 61 L. Ed. 995, in Davis v. Wolfe, 263 U. S. 239, 68 L. Ed. 286, 44 S. Ct. 66, where it was said:

> "The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designated to furnish him protection."

[fol. 124] I think the sentence "but merely creates a condition or situation in which the accident, otherwise caused, results in such injury" is in effect another way of stating the principle announced by Judge Andrews in the Palsgraf case, that the accident and its cause cannot be too remote from each other or one is not proximate to the other. Every negligence causes a condition. But we are left with the difficulty of determining when a result is proximate to a cause.

Applying the rules stated by Mr. Justice Andrews in the Palsgraf case, and having in mind the rulings of the Supreme Court of the United States in Davis v. Wolfe and the Pauly case, I think the question of whether or not the defective brake valve was the proximate cause of the fatal injuries to Lucus was at least a jury question.

It is suggested in the prevailing opinion, and the basis of the decision in the court below was that Lucus was not within the class of persons protected by that provision of the Safety Appliance Act requiring trains to be equipped

with brakes in good operating condition. To this proposition I cannot assent. While it is not necessary in this case to circumscribe the classes of railroad employees who fall within the protection of that provision of the Safety Appliance Act requiring trains to be equipped with brakes in good operating condition, I think that the protection of the statute extends at least to all employees whose duties require or permit their legitimate presence on the tracks. I think that Lucus was clearly within the class protected.

For the foregoing reasons, I think the decision of the trial court should be reversed.

Latimer, Justice, not participating.

[fol. 125] IN THE SUPREME COURT OF UTAH

JUDGMENT—October 31, 1947

"This cause having been heretofore argued and submitted and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the District Court herein be, and the same is, affirmed. Costs to respondent."

[fol. 126] IN THE SUPREME COURT OF UTAH

GROUNDS RELIED UPON BY APPELLANT IN SUPPORT OF HIS PETITION FOR REHEARING—Filed December 20, 1947

(1) This court has by its opinion herein deprived the plaintiff of a jury trial, and has decided this case contrary to the opinions in controlling cases decided by the Supreme Court of the United States.

(2) This court has erred in deciding as a matter of law that the admitted negligence of the defendant railroad was not the cause, in whole or in part, of the injuries and death of William Frank Lucus.

(3) This court has erred in holding that the defendant as a matter of law was not negligent toward the deceased, William Frank Lucus.

(4) This court has by its holding that the negligence of the defendant was not the cause, in whole or in part, of the

injuries and resulting death of William Frank Lucus, revived the defense of contributory negligence, notwithstanding the fact that this defense has been abolished by an Act of Congress.

[fol. 127] IN THE SUPREME COURT OF UTAH

ORDER DENYING PETITION FOR REHEARING—February 10, 1948

"Upon consideration of the Petition for Rehearing heretofore filed herein and the arguments of counsel thereupon had, it is ordered that a rehearing be, and the same is, denied."

[fol. 128] IN THE SUPREME COURT OF UTAH

PRAECIPE FOR RECORD—Filed March 22, 1948

To the Clerk of the Above-entitled Court:

Howard F. Coray, Ancillary Administrator of the Estate of William Frank Lucus, deceased, hereby designates and requests you to transcribe and certify the following material portions of the record to be incorporated into the transcript of record to be transmitted to the Supreme Court of the United States to accompany the Petition for a Writ of Certiorari in said cause to be filed in said Court by said administrator, plaintiff and appellant herein.

(References to "R" are to the page numbers of the Judgment Roll, and references to "B" are to page numbers of the Bill of Exceptions, all as contained in the Record on Appeal from the Second Judicial Court to the Supreme Court of the State of Utah said numbers appearing at the bottom of each page of the Judgment Roll and Bill of Exceptions.)

1. Complaint, filed in the District Court of Weber County, State of Utah, February 8, 1945 (R. 001 to 007).
2. Demurrer, filed March 13, 1945 (R. 008 to 009).
3. Order, filed April 4, 1945 (R. 010).
4. Amendment to Complaint, filed May 2, 1945 (R. 011 to 012).

5. Defendant's Answer, filed May 11, 1945 (R. 013) to 015).

6. Defendant's Motion for Directed Verdict, April 5, 1946 (B. 93, 94).

7. Trial Court's ruling on Motion for Directed Verdict, April 6, 1946 (B. 95).

8. Judgment on Verdict in Open Court, filed April 6, 1946 (R. 016).

9. Motion for New Trial, filed June 15, 1946 (R. 023).

[fol. 129] 10. Minute Entry of Ruling on Motion for New Trial filed July 1, 1946 (R. 025).

11. Notice of Appeal, filed July 6, 1946 (R. 027).

12. Clerk's Certificate (Clerk of the Second Judicial District Court, in and for Weber County), certifying Record on Appeal to the Supreme Court of Utah, dated July 10, 1946 (R. 028).

13. The following portions of the Bill of Exceptions,

B. 1 to 96, but omitting;

All of B. 2 and 3.

Lines 1 to 3, B. 4, both numbers inclusive.

Lines 13 to 16, 20 to 25, B. 22, both numbers in each instance inclusive.

Lines 10 and 11, and 19 to 22, B. 27, both numbers inclusive.

Lines 26 to 31, B. 28, both numbers inclusive.

Lines 1 to 3, B. 29, both numbers inclusive.

Lines 10 to 20, B. 33, both numbers inclusive.

Lines 30 and 31, B. 36.

Lines 1 to 4, and 21 to 24, B. 37, both numbers in each instance inclusive.

Lines 14 to 32, B. 42, both numbers inclusive.

Lines 1, and 6 to 20, B. 43, both numbers inclusive.

Lines 1, and 4 to 21, B. 54, both numbers inclusive.

Lines 1 to 4, B. 55, both numbers inclusive.

Lines 1, 16 to 27, and first four words on Line 28, B. 56.

Lines 4 to 30, B. 57, both numbers inclusive.

All of B. 58 to B. 88, both numbers inclusive.

Lines 1 to 7, B. 89, both numbers inclusive.

Lines 10 to 32, B. 92, both numbers inclusive.

Lines 1 to 6, 9 to 31, B. 93, both numbers in each instance inclusive.

All of B. 94 and B. 95.

[fol. 130] 14. Reporter's Certificate (B. 96).

15. Plaintiff's Exhibit "B", Telegraphic Report of Accident.

16. Defendant's Exhibit 2, consisting of photographs, together with notations on the back of each.

17. Rules 1112, 1119 and 1120 of Defendant's Exhibit 3, Rules Governing Operation of Track Cars.

18. Proposal for Settlement of Bill of Exceptions, dated July 2, 1946. (B. 97).

19. Order Settling Bill of Exceptions, dated July 8, 1946 (B. 98, 99).

20. Acknowledgment, dated July 3, 1946 (B. 99, 100).

21. Appellant's Statement of Errors Relied upon for Reversal, Brief of Appellant, Filed August 9, 1946, pages 19 and 20 of Brief.

22. Opinion of the Supreme Court of Utah, filed October 31, 1947.

23. Judgment of the Supreme Court of Utah, dated October 31, 1947.

(Minute entry on Judgment: "This cause having been heretofore argued and submitted and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the District Court herein be, and the same is, affirmed. Costs to respondent.")

24. Grounds relied upon by Appellant in support of his Petition for Rehearing. (Petition for Rehearing filed December 20, 1947), pages 1 and 2.

25. Order by the Supreme Court of Utah denying Petition for Rehearing, filed February 10, 1948. ("Upon consideration of the Petition for Rehearing heretofore filed herein and the arguments of counsel thereupon had, it is ordered that a rehearing be, and the same is, denied.")

[fol. 131] 26. This Praecipe.

27. Plaintiff's and Appellant's Offer to Stipulate for the Preparation and Submission of the Record in the above matter on Petition for Certiorari to the United States Supreme Court, and Defendant's and Respondent's Rejection of Proposal and Offer to Stipulate.

The portions of the Record designated herein are intended to constitute the record in the Supreme Court of the United States upon Petition for Writ of Certiorari to be filed by the plaintiff and appellant and for review upon said Writ of Certiorari, if granted. Said portions of the record are all of the material portions thereof necessary to

a proper presentation and consideration in the Supreme Court of the United States of the questions presented by the Petition for Certiorari.

Said transcript is to be prepared as required by law and the rules of this Court and the rules of the United States Supreme Court concerning Writs of Certiorari and to be immediately filed in the office of the Clerk of the Supreme Court of the United States in Washington, D. C.

Dated, this 17th day of February, A. D. 1948.

Parnell Black, B. E. Roberts, Rawlings, Wallace & Black, Clyde & Coray, Wayne L. Black, Attorneys for Plaintiff and Appellant.

Received copy of the foregoing Praecipe this 17th day of February, A. D. 1948.

Paul H. Ray, S. J. Quinney, A. H. Nebeker, Attorneys for Defendant and Respondent.

[fol. 132] IN THE SUPREME COURT OF UTAH

RESPONDENT'S PRAECIPE—Filed March 22, 1948

To the Clerk of the above entitled Court:

Southern Pacific Company herewith designates the following as those portions of the record and proceedings herein, which it deems should be contained in the record to be transmitted to the Supreme Court of the United States to accompany the Petition for Writ of Certiorari in said cause to be filed in said Court by the Plaintiff and Appellant herein:

1. Defendant's Exhibit 1 (certified copy of divorce proceeding.)

2. Defendant's Exhibit 4 (personal record.)

3. Bill of Exceptions, pages 60 to 79, both numbers inclusive, excluding therefrom the following:

Page 60,	lines	1 to 15,	inclusive
Page 65,	"	6 to 8,	"
Page 66,	"	19 to 20,	"
Page 74,	"	7 to 11,	"

Page 75, " 6 to 21, "
Page 78, " 8 to 11, "
Page 79, " 21 to 25,

4. Bill of Exceptions, pages 84 to 86 line 9, both numbers inclusive, excluding therefrom the following:

Page 84, lines 1 to 3 inclusive.

Said transcript is to be prepared as required by law and the rules of this Court and the rules of the United States Supreme Court concerning Writs of Certiorari and to be immediately filed in the office of the Clerk of the Supreme Court of the United States in Washington, D. C.

Dated this 10 day of March, 1948.

Paul H. Ray, S. J. Quinney, A. J. Nebeker, Attorneys for Defendant and Respondent.

[fol. 33] Received copy of the foregoing Respondent's Praecipe this 10 day of March, 1948.

Parnell Black, B. E. Roberts, Rawlings, Wallace & Black, Clyde & Coray, Wayne L. Black, Attorneys for Plaintiff and Appellant.

[fol. 134] IN THE SUPREME COURT OF UTAH

OFFER TO STIPULATE FOR THE PREPARATION AND SUBMISSION OF THE RECORD IN THE ABOVE MATTER ON PETITION FOR CERTIORARI TO THE UNITED STATES SUPREME COURT

Comes Now the plaintiff and appellant by and through his attorneys and hereby proposes and offers to enter into a stipulation with defendant and respondent for the preparation and submission of the record in the above case on petition for certiorari to the United States Supreme Court as follows:

That it be stipulated and agreed by and between the parties hereto that the portions of the record designated in the praecipe for record filed in the Supreme Court of Utah by plaintiff and appellant constitute the record in the Supreme Court of the United States upon petition for writ of certiorari, and that it be further stipulated that the portions of the record designated in said praecipe are all of the material portions thereof necessary to a proper presentation

and consideration in the Supreme Court of the United States of the questions to be presented by the petition for certiorari.

Dated, this 10th day of March, 1948.

Parnell Black, B. E. Roberts, Rawlings, Wallace & Black, Clyde & Coray, Wayne L. Black, Attorneys for Plaintiff and Appellant.

Received copy of the foregoing Offer to Stipulate this 11 day of March, 1948.

Paul H. Ray, S. J. Quinney, A. H. Nebeker, Attorneys for Defendant and Respondent.

[fol. 135] IN THE SUPREME COURT OF UTAH

REJECTION OF PROPOSAL AND OFFER TO STIPULATE

Comes Now the defendant and respondent in the above matter and does hereby reject the above proposal to stipulate concerning the preparation and presentation of the record upon petition for writ of certiorari to be filed by the plaintiff and appellant in the Supreme Court of the United States, and respondent and defendant requests that in addition to the portions of the record set forth and specified in the praecipe for record heretofore filed by plaintiff and appellant there be also included in the record to be submitted to the United States Supreme Court upon petition for writ of certiorari those portions of the record designated and set forth in respondent and defendant's praecipe for record also filed herein.

Dated, at Salt Lake City, Utah, this 11 day of March, 1948.

Paul H. Ray, S. J. Quinney, A. H. Nebeker, Attorneys for Defendant and Respondent.

[fol. 136] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 137] DEFENDANT'S EXHIBIT 1

Harvey G. Higgins, Attorney at Law, 448 So. Hill St. (603), Los Angeles, California, MUtual 5402, Attorney for Plaintiff.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

No. D225998

WILLIAM F. LUCUS, Plaintiff,

vs.

EDITH NAOMI LUCUS, Defendant

No. D225998 Dept.

Complaint—Divorce

Plaintiff complains and alleges:

I

That plaintiff and defendant at all times herein mentioned were and now are husband and wife.

II

That plaintiff has been for more than one year last past, a resident within the County of Los Angeles, State of California, and he has been continuously a resident within said County and State for said time immediately prior to the commencement of this action.

III

That plaintiff alleges for statistical purposes as required by Section 426-a of the Code of Civil Procedure:

(a) That plaintiff and defendant were married in the City of Los Angeles, County of Los Angeles, State of California.

(b) That the date of said marriage was December 26, 1936.

(c) That the date of separation was about January 1, 1941.

(d) That the period of time from marriage to separation was about four (4) years, and five (5) days.

[fol. 138] (e) That there — no children, the issue of said marriage.

IV

That there is no community property belonging to the parties.

V

That since the date of said marriage, the defendant has treated plaintiff in a cruel and inhuman manner, and has wrongfully inflicted upon him grievous suffering, pain and anguish; that all of said acts and conduct of said defendant were without excuse, cause or provocation, and caused plaintiff to suffer shame, embarrassment and humiliation, and caused him to become ill in mind and body, and impaired his health and happiness.

Wherefore: Plaintiff prays judgment against the defendant that the bonds of matrimony existing between the plaintiff and defendan*d* be dissolved.

Harvey G. Higgins, Attorney for Plaintiff.

[fol. 139] State of California,
County of Los Angeles, ss:

William F. Lucus, being by me first duly sworn, deposes and says: that he is the plaintiff, in the above entitled action; that he has read the foregoing Complaint—Divorce, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

William F. Lucus.

Subscribed and sworn to before me this 27th day of August, 1942. Harvey G. Higgins, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[fol. 140] [Stamp:] Filed Sep. 15, 1942. J. F. Moroney, County Clerk. By [Name illegible], Deputy.

C. Oscar Kalenius, 224 East Olive Avenue, Burbank, California. Charleston 8-3033. Attorney for Defendant.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. D 225998

WILLIAM F. LUCUS, Plaintiff,

vs.

EDITH NAOMI LUCUS, Defendant

ANSWER TO COMPLAINT

In answer to plaintiff's Complaint, defendant admits, denies and alleges as follows:

I

Answering part (a) of Paragraph III of plaintiff's complaint, defendant denies that the parties were married in the City of Los Angeles and alleges that they were married in the City of Kingman, State of Arizona.

II

Answering paragraph V of plaintiff's complaint, defendant denies, generally and specifically, each and every allegation therein contained.

Second Defense

Defendant alleges that the complaint of plaintiff does not state facts sufficient to constitute a cause of action against this defendant.

Wherefore, defendant prays that plaintiff take nothing by [fol. 141] his action; that the relief prayed for by defendant in her Cross-complaint be granted; and for such other equitable relief as to the Court may seem meet and proper.

C. Oscar Kalenius, Attorney for Defendant.

[fol. 142] STATE OF CALIFORNIA,
County of Los Angeles, ss:

Edith Naomi Lucus, being by me first duly sworn, deposes and says: That she is the defendant in the foregoing and above entitled action; that she has read the foregoing answer and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

Edith Naomi Lucus.

Subscribed and sworn to before me this 12th day of Sept., 1942. C. Oscar Kalenius, Notary Public in and for said County and State. My Commission Expires Aug. 19, 1946. (Notarial Seal.)

(Affidavit of Service by Mail—1013A, C. C. P.)

STATE OF CALIFORNIA,
County of Los Angeles, ss:

C. Oscar Kalenius, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 224 E. Olive Ave., Burbank, Calif. That on the 14th day of Sept., A.D., 1942, affiant served the within answer on the attorney for plaintiff in said action, by placing a true copy thereof in an envelope addressed to Harvey G. Higgins at the business address of said Harvey G. Higgins, as follows: 448 So. Hill (603), Los Angeles, Calif., and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Burbank. That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

C. Oscar Kalenius.

Subscribed and sworn to before me this 14th day of Sept., 1942. Kathleen M. Schrack, Notary Public in and for said County and State. My Commission Expires July 8, 1945.

Here quote from envelope name and address of addressee.

[fol. 143] [Stamp:] Filed Sep. 15, 1942. J. F. Moroney, County Clerk. By [Name illegible], Deputy.

C. Oscar Kalenius, 224 East Olive Avenue, Burbank, California. Charleston 8-3033, Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. D 225998

WILLIAM F. LUCUS, Plaintiff,

vs.

EDITH NAOMI LUCUS, Defendant

CROSS-COMPLAINT FOR SEPARATE MAINTENANCE

The defendant complains of the plaintiff and for the cross-complaint alleges as follows:

I

For the sake of convenience and to avoid confusion, cross-complainant is hereinafter referred to as defendant and cross-defendant is hereinafter referred to as plaintiff.

II

Defendant now is, and for more than one year last past has been, a resident of the county of Los Angeles, State of California.

III

That defendant and plaintiff intermarried at the City of Kingman, State of Arizona, on the 26th day of December, 1936, and ever since have been, and now are, wife and husband.

IV

That the said defendant, Edith Naomi Lucus, is without funds with which to pay her attorney's fees for the prosecu-[fol. 144] tion of the within action or to adequately support herself; that said plaintiff, William F. Lucus, is an able-bodied man, steadily employed, who earns and receives a sufficient sum of money with which to pay a reasonable sum as and for attorney's fees for the defendant and her costs of suit herein, and to support the defendant.

V

That, although defendant has been a good and loving wife to the plaintiff, plaintiff has been guilty of extreme cruelty in his treatment of defendant, causing her great mental pain, suffering and anguish.

VI

That plaintiff deserted and abandoned defendant more than a year prior to the commencement of his action and lived separate and apart from the defendant against the will and wishes of the defendant; that during all of said time said plaintiff did not contribute anything to the support of defendant and did not supply her with the necessities of life; that during the entire married life of the parties the defendant has been forced to work to earn her livelihood and necessities of life; that plaintiff has always earned more than enough money to support defendant but has failed, neglected and refused so to do; all of which has been due to no fault of the defendant.

V

That plaintiff squanders his money on liquor, in bars and on freinds and acquaintances with whom he associates with at public drinking places, constantly drinking to excess.

VI

That defendant has pleaded and begged plaintiff to give up his disreputable friends, to cease patronizing public bars and to return home and live with defendant; that plaintiff has persistently refused to do so; that due to his excessive [fol. 145] drinking, plaintiff has become, in the past, involved in several grievous difficulties, from which defendant was able to extricate him only after great and costly effort; that due to plaintiff's conduct, defendant worries about him and is in constant dread that he will again become involved in difficulties; that her worry has been so great that it has affected her health and she cannot sleep or rest properly, has lost her appetite and is almost physically exhausted; that she is in need of medical attention and cannot afford to pay for it; that she fears that she may have to quit her job because of her health; that unless she receive financial aid from plaintiff she will suffer to a great extent.

That plaintiff is able to pay to the defendant the sum of $60.00 a month for her support and maintenance; that said sum is reasonable for support and maintenance of defendant according to her circumstances and the ability of plaintiff to contribute thereto.

Wherefore, defendant prays:

1. That she may live separate and apart from defendant.

2. That this court make an order directing that said plaintiff pay to plaintiff $60.00 a month for her support and maintenance, and also a reasonable sum of money as and for attorney's fees and cost of suit.

For such other and further relief as to the court may seem meet, just and equitable in the premises.

C. Oscar Kalenius, Attorney for defendant.

[fol. 146] STATE OF CALIFORNIA,
County of Los Angeles, ss:

Edith Naomi Lucus, being by me first duly sworn, deposes and says: That she is the defendant in the foregoing and above entitled action; that she has read the foregoing cross-complaint and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

Edith Naomi Lucus.

Subscribed and sworn to before me this 12th day of Sept., 1942. C. Oscar Kalenius, Notary Public in and for said County and State. My Commission Expires Aug. 19, 1946. (Notarial Seal.)

(Affidavit of Service by Mail—1013A, C. C. P.)

STATE OF CALIFORNIA,
County of Los Angeles, ss:

C. Oscar Kalenius, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 224 E.

Olive Ave., Burbank. That on the 14th day of Sept., A.D., 1942, affiant served the within Cross-complaint on the attorney for plaintiff in said action, by placing a true copy thereof in an envelope addressed to Harvey G. Higgins at the business address of said Harvey G. Higgins, as follows: 408 So. Hill, 603 Pershing Sq. Bldg., Los Angeles, Calif., and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Burbank, Calif. That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

C. Oscar Kalenius.

Subscribed and sworn to before me this 14th day of Sept., 1942. Kathleen M. Schrack, Notary Public in and for said County and State. My Commission Expires July 8, 1945.

Here quote from envelope name and address of addressee.

Note:

Turn to Card 3 for

Pages 112-120;

Turn to Card 4 for

Pages 121-126

[fol. 162] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

Honorable William S. Baird, Judge Presiding

Department No. 8

Dated January 6, 1943.

No. D 225998

WILLIAM F. LUCUS, Plaintiff,

vs.

EDITH NAOMI LUCUS, Defendant

File Copy of Minute Order

Order to show cause re alimony pendente lite, costs, attorney fees, support and restraining order comes on for hearing, plaintiff present with his attorney, Harvey Higgins and the defendant with her attorney, C. Oscar Kalenius. Plaintiff and defendant are both sworn and testify. The plaintiff is ordered to pay to the defendant $10.00 per week for the support of the defendant commencing February 1, 1943, through Karl Holton, the court trustee; also $100.00 attorney fees and $5.00 costs, payable $10.00 per month commencing February 15, 1943, direct to defendant's attorney.

WILLIAM F. LUCUS

vs.

EDITH NAOMI LUCUS

No. D 225998

STATE OF CALIFORNIA,
County of Los Angeles, ss:

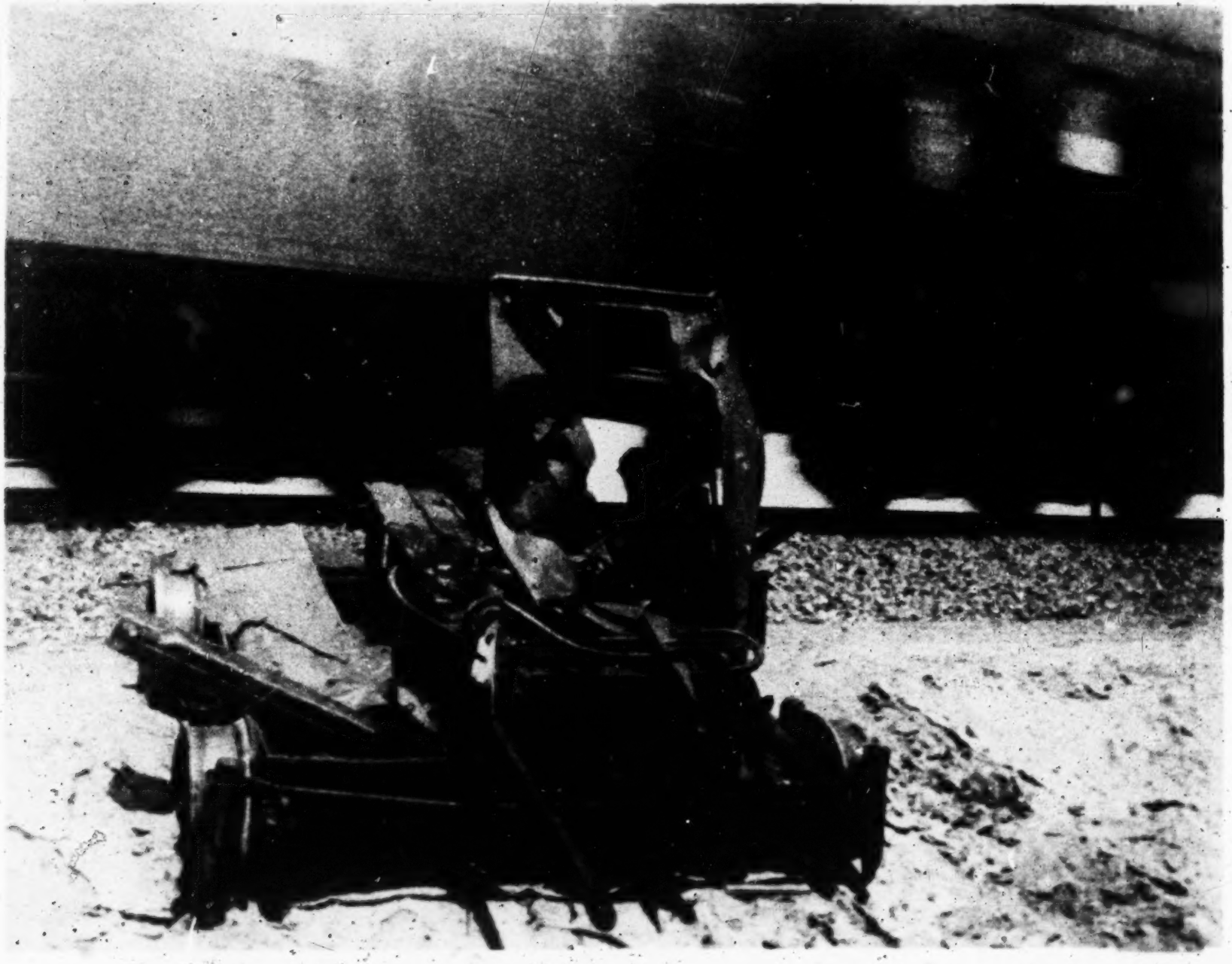
I, J. F. Moroney, County Clerk and Clerk of the Superior Court within and for the county and state aforesaid, do hereby certify the foregoing to be a correct copy of the original Complaint — Divorce, filed August 27, 1942; Answer to Complaint, filed September 15, 1942; Cross-Complaint for Separate Maintenance, filed September 15, 1942;

Order to Showe Cause, etc., filed September 18, 1942; Minute Order dated September 24, 1942 in Dept. 8, the Honorable William S. Baird, Judge Presiding; Order to Show Cause, etc., filed November 20, 1942; Order to Show Cause, etc., filed December 22, 1942; Answer to Cross-Complaint, filed January 6, 1943; Affidavit of Husband, etc., filed January 6, 1943; and Minute Order dated January 6, 1943, in Dept. 8, the Honorable William S. Baird, Judge Presiding, on file and/or of record in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 3rd day of April, 1946.

J. F. Moroney, County Clerk, by Carolina Terrazas, Deputy.

"Defendant's Exhibit 2-Photographs of scene of accident"

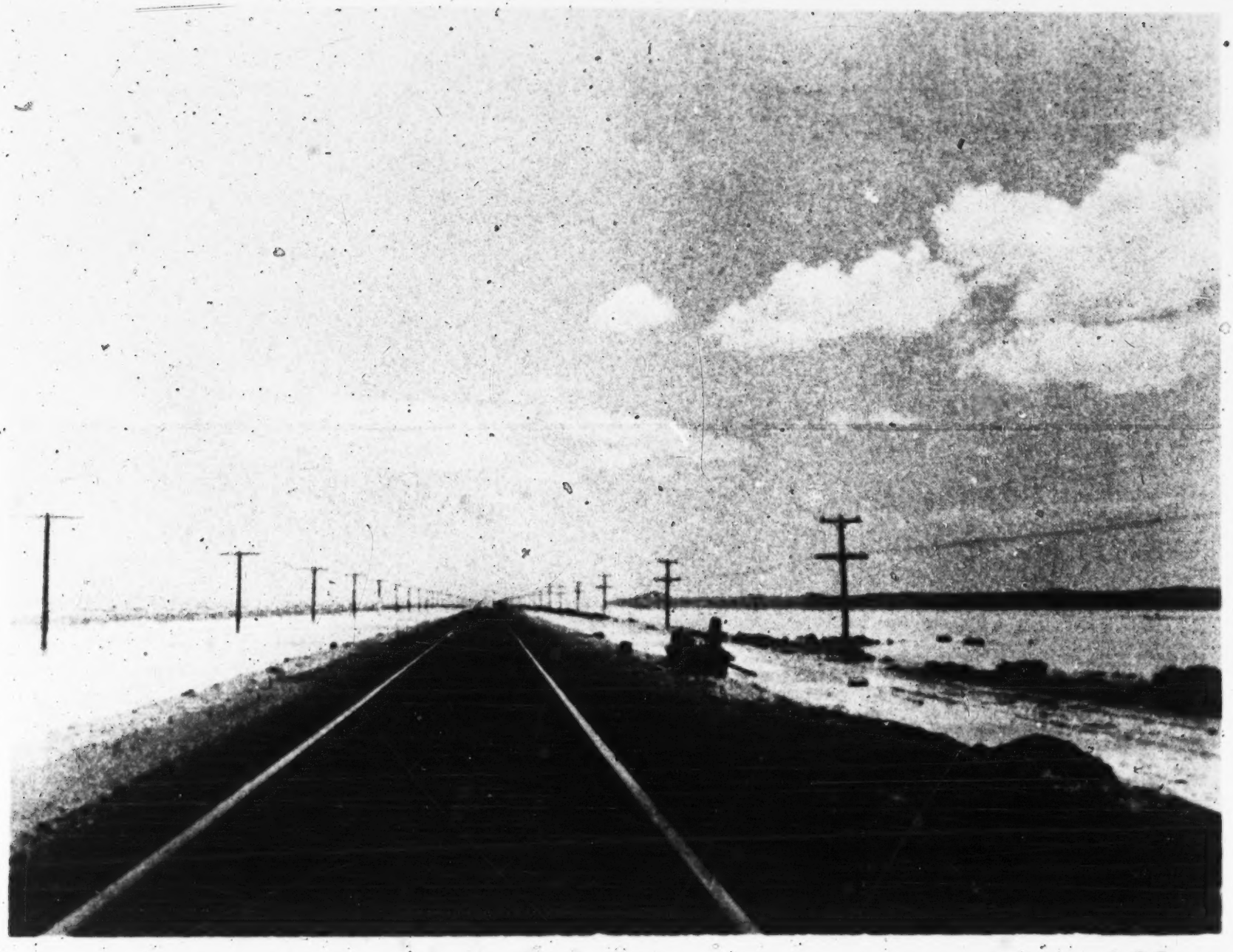


163a

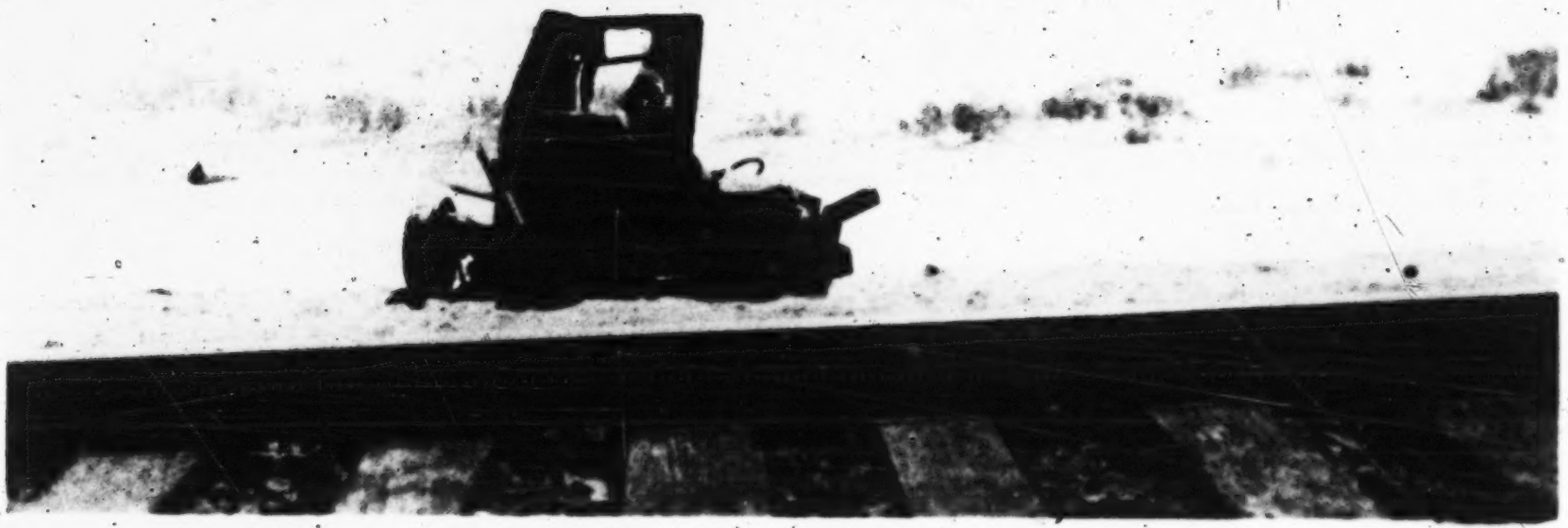
CAMERA FACING EAST

163b

CAMERA FACING EAST



163c



163d

CAMERA FACING EAST

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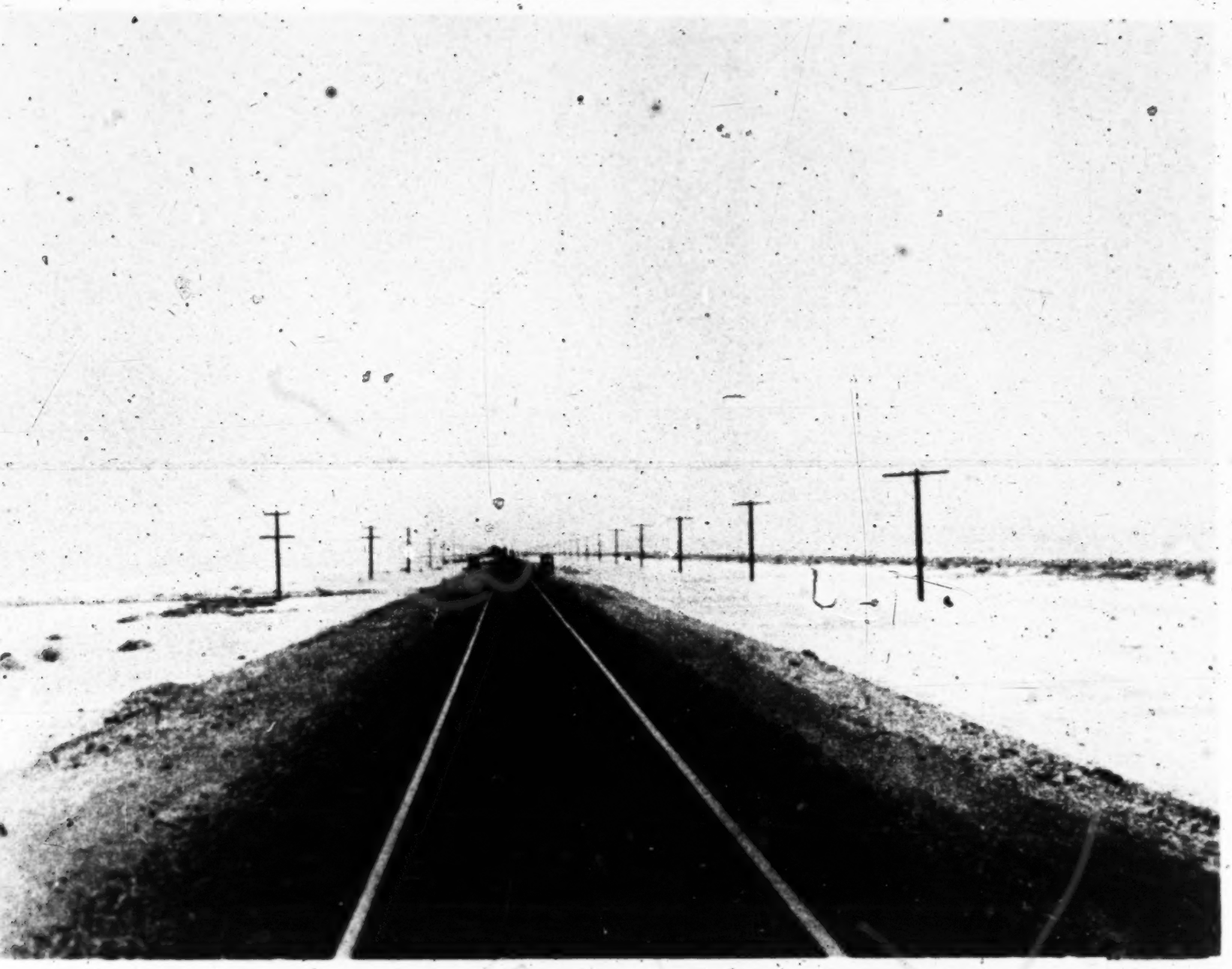

163g

[fol. 164] DEFENDANT'S EXHIBIT 3

J. H. T. Oct. 14, 1944

SOUTHERN PACIFIC COMPANY

Rules Governing Operation of Track Cars

Issued September, 1944

[fol. 164-1-2] NOTICE

The rules contained herein governing the operation of track cars are identical with Rules 1100 to 1127 both inclusive of "Rules and Regulations for the Maintenance of Way and Structures, effective November 15, 1943," and are issued in this form for convenient distribution and usage. They supersede all previous rules and instructions inconsistent therewith

Employes to whom they apply must provide themselves with a copy and are required to understand and obey them.

E. E. Mayo, Chief Engineer. A. W. Flanagan, Supt. of Telegraph.

Approved: J. W. Corbett, General Manager.

[fol. 164-3] Rules Governing Operation of Track Cars

Definition: Track Car—Motor, hand, push or gravity car or velocipede.

1100. Track cars must be thoroughly inspected by foreman or other employe in charge as frequently as necessary to insure that all bolts, nuts, and cotters are in place and tight; that gasoline tank, feed pipes, and connections do not leak; that rail sweeps are in place and in proper adjustment; that brakes are in good condition and adjustment; and that wheel gage is correct. They must be kept clean and in good order and bearings and machinery well oiled. Cars considered unsafe to operate must be withdrawn from service immediately and report made to the proper officer; also cars requiring repairs, although not unsafe to operate, must be similarly reported.

1101. Track cars shall be operated only by duly authorized and properly qualified employes while on Company

business. Only employes whose duties require it will be permitted to ride on these cars.

1102. A watch conforming to requirements of Rule 2 and a copy of the current time-table, and supplements if any, must be carried by each employe in charge of track car.

1103. Employe in charge is held responsible for carrying necessary flags, torpedoes, fusees, and red and white lanterns, for use as required under the rules.

1104. Track cars shall not be used unless accompanied by sufficient men to remove them from track in case of emer- [fol. 164-4] gency and, whenever possible, a line-up of trains should be obtained before starting on a run, and approximately each two hours thereafter. When not in use, track cars shall be removed from track and locked or otherwise secured at a distance of not less than six feet from the nearest rail and so placed as not to obstruct public or private road crossing.

1105. Materials, tools, and supplies must be so placed on cars that they will not fall off, and the load should be distributed uniformly over the car. Lining bars or other bars must be placed in bottom of tool trough. Tools must be laid flat, and pointed tools or poles placed with points to rear.

1106. Before starting, there should be a thorough understanding as to what part each person is to take in handling the car should an emergency arise necessitating prompt removal of car from track.

1107. Spark must be fully retarded before starting free-running motors.

1108. Free-running motors must be started by giving crank a quarter turn, lifting on crank with fingers and thumb on same side of handle and keeping body as far away as possible. Springing or moving crank by downward pressure when starting motor is not permitted.

1109. When starting direct-connected track cars, they should be pushed from rear and not from the side.

1110. Drivers must test brakes immediately after starting cars. Brakes must be applied gradually and emergency stops made only when absolutely necessary.

1111. Motors must be kept in gear while descending steep grades.

[fol. 164-5] 1112. When following moving trains, track cars must remain not less than 400 feet to the rear of same, and shall not stop within 200 feet of standing trains. When running, the distance between individual track cars, or between groups of coupled track cars, must not be less than 500 feet. When stopping, the car or group of cars in advance must give signal to the following car.

1113. Track motor cars must not under any circumstance be used to shove or pull hand cars. When used to pull push cars, it must be at a safe speed not to exceed 15 miles per hour. No one shall be permitted to sit on track cars so that any part of his body can be caught between cars in event of derailment. Track cars in motion should whenever possible be boarded from the rear, and employes should remain seated while track cars, except hand cars, are in motion. The use of seats that are not securely fastened to cars is prohibited.

1114. Push cars or trailers used with motor cars or other power-propelled equipment must be coupled behind and not pushed ahead of the motorized unit, except that in the event movement with push car or trailer in front of the motorized unit is made in shuttle service between material piles and site of the work, such movement shall be for short distances only, speed shall not exceed eight miles per hour, and no one shall be permitted to ride on such push cars or trailers during such movement. Whenever practicable, this movement should be avoided on descending grades.

Push cars or trailers used on heavy grades or in mountain territory shall be equipped with adequate couplings and braking devices.

1115. Employes in charge must see that torpedoes exploded by track cars are immediately replaced in the same location.

[fol. 164-6] 1116. Flangeways in public or private crossings should be carefully watched for stones or other obstructions.

1117. When approaching street or highway grade crossings operators of track cars must have their cars under control and before proceeding must know that vehicular traffic will not be endangered. When necessary to permit

of safe passage, track cars must be preceded by a flagman or in the case of one-man cars, they must be stopped and pushed over the crossing.

● 1118. Transporting heavy material such as ties, rails, frogs, etc., must be restricted except in case of emergency to push cars of proper capacity. A man should be assigned to ride loaded trailers to minimize the possibility of accident from tools or material falling on the track from such cars.

Whenever a track car loaded with rail or other material which projects more than four feet beyond the bed of the car, is operated across or upon public roads or streets, a red flag by day and a red light by night shall be displayed at the protruding ends of the load in such a position as to be clearly visible to drivers of vehicles upon the road or street.

1119. Track cars must not under any circumstances be operated at a speed in excess of 15 miles per hour, nor over road crossings at speed in excess of 4 miles per hour; and after dark or through stormy or foggy weather when visibility is poor, speed shall be reduced to the absolute minimum consistent with safety. A constant and vigilant lookout must be maintained and speed controlled approaching inter-locked derails and switches or those operated by remote control, so that stop can be made to avoid accident [fol. 164-7] in the event the route is unexpectedly changed. Before rounding sharp curves or through tunnels and snowsheds where view is obscured, flagman must be sent ahead for protection, if it cannot otherwise be positively determined that way is clear.

1120. Although block signals and indicators for track cars may indicate that a block is not occupied by a train, operators of track cars must bear in mind that an approaching train may immediately thereafter enter the block, or that another track car may at any time be encountered; and further that lineups obtained from train dispatcher cannot always be depended upon by reason of conditions unexpectedly changing in the meantime.

1121. Track cars should be pushed through the spring rail side of frogs or operated at a speed not in excess of 4 miles per hour. Main track switches and derails protecting main track, or switches and derails connected with automatic block signals, must not ordinarily be thrown for track

cars; such cars must be lifted over. When necessary to throw switches, for example, for loaded push cars, it must be done only under the personal supervision of the foreman, and switch must be immediately returned to its proper position, locked, and inspected. Foreman is responsible for the returning to proper position and the locking and inspecting of all switches used by his gang.

1122. Cars being operated on double track must be stopped and all employees must stand outside and in the clear of both tracks while a train is passing on adjoining track.

1123. Smoking or the use of open light around track cars is forbidden when tanks are being filled or gasoline [fol. 164-8] handled. Track cars must not be inspected with matches or torches, and, when shipped on trains, gasoline tanks and carburetors must be drained.

1124. All accidents and personal injuries resulting from the use of track cars must promptly be reported and thoroughly investigated by the person in charge.

1125. Where there are track circuits, none but insulated track cars must be used.

1126. The following practices are forbidden:

(a) Operation of track cars between platform and train receiving or discharging passengers at a station.

(b) Getting on or off moving track cars except in emergency or when starting car.

(c) Interfering with driver of car.

(d) Filling gasoline tank while engine is running.

(e) Starting motor of track car or allowing motor to run while within tool or car house.

(f) Using kerosene as an anti-freeze solution in radiators.

(g) Handling friction drive or belt unless ignition is cut out.

(h) Application of unapproved devices to track cars.

1127. Track cars must display a white light to the front and a red light to the rear when operated at night, or during fog or storms or through tunnels.

When fog or other weather conditions obscure the vision, the use of track cars should be avoided, except in emergency.

(Here follows 3 photos, side folios 165, 165a, 166)

Note:

Turn to Card 4 for

Pages 142A
142B
142C

[fol. 167] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the Supreme Court of the State of Utah is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Dom. Rel. 12-8/41

(Page 112)

FILED

SEP 1

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

WILLIAM F. LUCAS

Plaintiff,

vs.

EDITH NAOMI LUCAS

Defendant.

No. D 225998

Order to Show Cause and Affidavit in re Attorney's Fees, Court Costs, Alimony Pendente Lite, Allowance for Support and/or Custody of Children and Restraining Order.

(Strike out inappropriate portions)

To the above named William F. Lucas

(1) You are hereby ordered to appear before the above-entitled court in Department 8 thereof on the 24 day of Sept. 19 42 at the hour of 1:45 P. M., then and there to show cause, if any you have, why:

(a) You should not be required to pay the adverse party above named reasonable sums for attorney's fees, court costs, and for the support and maintenance of said adverse party and the minor children during the pendency of this action.

(b) The custody of the minor children of the parties above named should not, during the pendency of this action, be awarded as follows:

(c) Pending the trial of this action you should not be, and pending the hearing of this Order, you are, enjoined and restrained from:

(1) Taking or permitting to be taken out of this state any of the minor children of the parties thereto;

(2) Conveying or encumbering any of the community real or personal property except in the ordinary course of business, or withdrawing any funds on deposit in any bank except such as are reasonably necessary in the ordinary course of business or for usual living expenses;

(d) Further Order should not be made as follows:

(2) It appearing that the convenience of the court and the prompt and efficient disposition of the business thereof require the same, it is further ordered that you serve upon the adverse party and file with this court, at least two days prior to the date of hearing above specified, an affidavit in substantially the form of that hereunto attached, giving the information therein called for.

(3) This order shall be served by personally delivering a copy thereof attached to a copy of the affidavit upon which it is based, together with a copy of the Form denominated "Husband's Questionnaire," to the party affected at least five days prior to the date of hearing.

Dated September 7, 1942.

Judge of the Superior Court.

Affidavit on Reverse Side

147

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WIFE'S QUESTIONNAIRE

Attorneys representing the wife in Domestic Relations cases are requested to use this form in every such case involving attorney's fees, court costs, alimony pendente lite, a temporary restraining order, allowance for support and/or for custody of children; it will itself constitute the affidavit for, (or in opposition to) the order to show cause.

Affidavit for Order to Show Cause in re
Attorney's fees, Court Costs, Alimony Pendente lite, allowance for support, restrainin order

STATE OF CALIFORNIA, }
County of Los Angeles } ss.

Edith Naomi Lucas, being first duly sworn, deposes and says: That she is the defendant in the above-entitled action and that she has read the following questions and makes the following answers and statements of fact as material evidence in this case.

1. Date of marriage: Dec. 26, 1936 of separation: Jan 1, 1941
2. What is your age? 42 Husband's age? 41
3A. Have you any organic disease or major physical defect, and if so, what? no
3B. Has your husband any organic disease or major physical defect, and if so, what? no

4A. What are your necessary Monthly expenses? 190.50

Rent, case pay taxes	32.00
Food	30.00
Clothes	20.00
Transportation	15.00
Doctor & Dentist	10.00
Laundry	4.00
Utilities	7.00
Insurance care house hard	5.00
Incidentals	10.00
car contract	42.00
Yard improv. contract	6.50
Total Salary loan	10.00
	190.50

4B. Your Husband's? 58.00

10.00
30.00
5.00
5.00
3.00
1.00

5A. What is the present net financial worth of yourself? Contract equity in home
5B. Of your husband? nothing except current wages
6A. What is your present total monthly income from all sources? 120.00
6B. Of your husband? 150.00 minimum
7A. What was the net income last year from all sources (specify sources) of yourself? 1440
7B. of your husband? 1800.00
8. Have you ever been employed? yes State the dates, occupations, and salaries received. Steno, reporter at 1440 a year
9. Do you expect to work in the future? yes At what occupation? Steno. if health allows Commencing when? now ~~marring~~ working
10. Have you personally arranged to pay your attorney's fees in this case? no how much, if anything, have you paid? 00 Court costs? 00
11. State number, names and ages of minor children of yourself and husband: none
12. Custody of children at present is as follows:
13. I request that an order be made fixing their custody as follows:
14. Where and with whom do you reside? alone at 5715 Iverton Ave, Hollywood
15. Where do you intend to house children and with whom? Describe accommodations:

husband can be restrained from disposing of personal property 13 + Cal 613

16. **Here state additional material facts, if any: (If Restraining Order is sought state here the facts you claim justify it, etc.)** that plaintiff has threatened to dispose of property belonging to the parties, valued at hundreds of dollars, either by selling the same or destroying it; that plaintiff states he is about to go into the army; that unless he is restrained from disposing of said goods defendant will suffer great and irreparable injury; that defendant fears that he will dispose of said property and promptly go into the army

~~Superior Court has jurisdiction upon proper showing to restrain husband from alienating separate property. Paige Vs. Atkins, 12 Cal 401~~

~~In a divorce proceeding the Court may by use of a temporary restraining order prevent husband from alienating Community Property Nicholas V. Flood 96 Cal 394~~

17. **Based upon the foregoing facts I declare that the following sums are reasonably necessary, are within the ability of my husband to pay, and that it will be fair and equitable to require him to pay them:**

(1) For attorney's fees	$ Reasonable
(2) For court costs	$ 15.00
(3) For alimony pendente lite, per month Payable weekly	$ 60.00
(4) For support of children, per month Payable _____	$ _____

18. **I have answered each of the foregoing questions and given all the information called for as far as within my ability to do so and each answer and statement of fact is true to my own knowledge excepting only such as are stated to be upon information and belief and as to such latter I have stated the sources of my information and I verily believe the same to be true.**

Edith Noone Lucas
Wife's Signature.

Subscribed and sworn to before me, this 12th day of Sept, 19 42

C. Orion Pellerin
Notary Public, Los Angeles County, California.
My Commission Expires [illegible]

L. E. LAMPTON, County Clerk.

By _____, Deputy

FINANCIAL STATEMENTS

Statement of all community property, both real and personal, belonging to husband and wife.

Cash in possession of wife $ none. Cash in possession of husband $?

No	Description	Gross Value	Incumbrances	Gross Income	Fixed Charges	Net Income

Statement of all separate property, both real and personal, owned by wife:

	City home	4000	2400.00	none	32	none

Statement of all separate property, both real and personal, owned by husband:

	1931 Packard car	?	?			

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

Honorable WILLIAM S BAIRD, Judge Presiding — Department No. 8

Dated September 24, 1942

~~Entered xxxxxxxxxxxxxxxxxxxxxxxxxxxx~~

WILLIAM F LUCUS, Plaintiff,

vs.

EDITH NAOMI LUCUS, Defendant.

No. D 225998

FILE COPY OF MINUTE ORDER

ORDER TO SHOW CAUSE RE ALIMONY PENDENTE LITE, COSTS, ATTORNEY FEES AND RESTRAINING ORDER COMES ON FOR HEARING AND IS ORDERED OFF CALENDAR. THE RESTRAINING ORDER IS DISSOLVED.

150

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B. Roy Schauer Dom. Rel. Form 2- 8/40

[illegible]
Attorney for Defendant
224 East Olive Avenue
Burbank, California
Olympic 1-2033

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

WILLIAM F. [illegible]
Plaintiff,
vs.
[illegible]
Defendant.

No. [illegible]

Order to Show Cause in re Attorney's Fees, Court Costs, Alimony Pendente Lite, ~~Allowance for Support and/or Custody of Children and Restraining Order~~.

(Strike out inappropriate portions)

To the above named [illegible]:

(1) You are hereby ordered to appear before the above-entitled court in Department [illegible] thereof on the 7 day of [illegible], 19[illegible] at the hour of 1:[illegible] M., then and there to show cause, if any you have, why:

(a) You should not be required to pay the adverse party above named reasonable sums for attorney's fees, court costs, and for the support and maintenance of said adverse party and the minor children during the pendency of this action.

(b) The custody of the minor children of the parties above-named should not, during the pendency of this action, be awarded as follows:

(c) Pending the trial of this action you should not be, and pending the hearing on this Order, you are, enjoined and restrained from:

(1) Taking or permitting to be taken out of this state any of the minor children of the parties thereto;

(2) Conveying or encumbering any of the community real or personal property except in the ordinary course of business, or withdrawing any funds on deposit in any bank, except such as are reasonably necessary in the ordinary course of business or for usual living expenses;

(d) Further Order should not be made as follows:

(2) It appearing that the convenience of the court and the prompt and efficient disposition of the business thereof require the same, it is further ordered that you serve upon the adverse party and file with this court, at least two days prior to the date of hearing above specified, an affidavit in substantially the form of that hereunto attached, giving the information therein called for.

(3) This order shall be served by personally delivering a copy thereof attached to a copy of the affidavit upon which it is based, together with a copy of the Form denominated "Husband's Questionnaire," to the party affected at least five days prior to the date of hearing.

Dated NOV 13 19[illegible], 19____.

WITNESS my hand

HONORABLE WM. S. BAIRD

[illegible]

Judge of the Superior Court.

COURT COMMISSIONER
DEPT. 8 - 10TH FLOOR - CITY HALL

151

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AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA,
County of Los Angeles } ss.

....., being sworn, says:

I am and was on the date herein mentioned over the age of eighteen years and not a party to this action; I served the within or foregoing Order to Show Cause in this action on.....

.....on the.....day of ....., 19....., by personally delivering to and leaving with said party, on said date, in the County of Los Angeles, State of California, a true copy thereof attached to a copy of the Affidavit therein referred to.

Subscribed and Sworn to before me, on

....., 19.....

.....
Signature

.....
Notary Public in and for the County of Los Angeles, State of California.

L. E. LAMPTON, County Clerk,

By ..... Deputy

(SEAL)

FILED
NOV 20,

112

Dom. Rel. 12 8/41

[illegible]

FILED

DEC 22 1942

L. E. MORONEY, County Clerk

By [illegible] DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

[illegible] Plaintiff,

vs.

[illegible] Defendant.

No. D 22[illegible]E

Order to Show Cause and Affidavit in re Attorney's Fees, Court Costs, Alimony Pendente Lite, Allowance for Support and/or Custody of Children and Restraining Order.

(Strike out inappropriate portions)

To the above named [illegible]:

(1) You are hereby ordered to appear before the above-entitled court in Department 8 thereof on the 6 day of Jan, 19 43 at the hour of 9:30 A. M., then and there to show cause, if any you have, why:

(a) You should not be required to pay the adverse party above named reasonable sums for attorney's fees, court costs, and for the support and maintenance of said adverse party ~~and the minor children during the pendency~~ of this action.

(b) ~~The custody of the minor children of the parties above named should not, during~~ the pendency of this action, ~~be awarded as follows~~:

(c) Pending the trial of this action you should not be, and pending the hearing on this Order, you are, enjoined ~~and restrained~~ from:

(1) Taking or permitting to be ~~taken out~~ of this state any of the minor children of the parties thereto;

(2) Conveying or encumbering any of the community real or personal property except in the ordinary course of business, or withdrawing any funds on deposit in any bank, except such as are reasonably necessary in the ordinary course of business or for usual living expenses;

(d) Further Order should not be made as follows:

(2) It appearing that the convenience of the court and the prompt and efficient disposition of the business thereof require the same, it is further ordered that you serve upon the adverse party and file with this court, at least two days prior to the date of hearing above specified, an affidavit in substantially the form of that hereunto attached, giving the information therein called for.

(3) This order shall be served by personally delivering a copy thereof attached to a copy of the affidavit upon which it is based, together with a copy of the form denominated "Husband's Questionnaire," to the party affected at least five days prior to the date of hearing.

Dated DEC 22 1942, 19

WITNESS THE HONORABLE WM. S. BAIRD

Judge of the Superior Court

COMMISSIONER

DEPT 8 - 10 H FLOOR - CITY HALL

Affidavit on Reverse Side

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WIFE'S QUESTIONNAIRE

Attorneys representing the wife in Domestic Relations cases are requested to use this form in every such case involving attorney's fees, court costs, alimony pendente lite, a temporary restraining order, allowance for support and/or for custody of children; it will itself constitute the affidavit for, (or in opposition to) the order to show cause.

Affidavit for Order to Show Cause in re

_____

_____

STATE OF CALIFORNIA, }
County of Los Angeles } ss.

_____, being first duly sworn, deposes and says: That she is the _____ in the above-entitled action and that she has read the following questions and makes the following answers and statements of fact as material evidence in this case.

1. Date of marriage: _____ of separation: _____
2. What is your age? _____ Husband's age? _____

3A. Have you any organic disease or major physical defect, and if so, what? _____

3B. Has your husband any organic disease or major physical defect, and if so, what? _____

4A. What are your necessary Monthly expenses?

Rent	
Food	
Clothes	
Transportation	
Doctor & Dentist	
Laundry	
Utilities	
Insurance	
Incidentals	
Total	

4B. Your Husband's?

5A. What is the present net financial worth of yourself? _____

5B. Of your husband? _____

6A. What is your present total monthly income from all sources? _____

6B. Of your husband? _____

7A. What was the net income last year from all sources (specify sources)

of yourself?	7B. of your husband?

8. Have you ever been employed? _____ State the dates, occupations, and salaries received.
_____

_____

9. Do you expect to work in the future? _____ At what occupation? _____
Commencing when? _____

10. Have you personally arranged to pay your attorney's fees in this case? _____ how much, if anything, have you paid? _____ Court costs? _____

11. State number, names and ages of minor children of yourself and husband: _____
_____

12. Custody of children at present is as follows: _____
_____

13. I request that an order be made fixing their custody as follows: _____
_____

14. Where and with whom do you reside? _____
_____

15. Where do you intend to house children and with whom? Describe accommodations: _____
_____

DEC 22 1942

Harvey G. [redacted]ins,
448 So. Hil[redacted].
Los Angeles, [redacted]or[redacted].
MUtual 5402.

[redacted]ney for plai[redacted]

In the Superior Court of the State of California,

In and for the County of Los Angeles.

William F. Lucus,
Plaintiff,

vs

Edith Naomi Lucus,
Defendant.

No. D. 225 998.

ANSWER to Cross-complaint.

Comes now the plaintiff and answering the Cross-complaint on file herein, denies and alleges as follows:

I.

That said plaintiff denies generally and specifically each and every allegation setforth in paragraphs IV, V, VI, VII, VIII and IX of the defendants cross-complaint on file herein.

WHEREFORE: Plaintiff prays that defendant take nothing by reason of said cross-complaint.

Attorney for plaintiff.

HARVEY G HIGGINS
ATTORNEY AT LAW
603 PERSHING SQUARE BLDG.
448 SOUTH HILL STREET
LOS ANGELES, CALIF.
PHONE MUTUAL 5402

(P. 120)

STATE OF CALIFORNIA,
County of Los Angeles, } ss

(P. 121)

_____ being by me first duly sworn, deposes and says: that he is the _____ in the above entitled action; that he has read the foregoing _____ and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Subscribed and sworn to before me this

_____ day of _____ 19__

Notary Public in and for the County of Los Angeles, State of California

[SEAL]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

(Nature of Pleading)

No. [illegible]

[illegible] Plaintiff

vs.

[illegible] Defendant

HARVEY G. HIGGINS
ATTORNEY AT LAW
603 PERSHING SQUARE BLDG
448 SOUTH HILL STREET
LOS ANGELES CALIF
PHONE MUTUAL 5402

Attorney for [illegible] and Cross-defend[illegible]

Received copy of the within [illegible] to X-c[illegible] this 6th day of [illegible] 19[illegible]

Excar Flo

Attorney for defendant

Received copy of the within— this day of 19

Attorney for

157

(P. 122)

Dom. Rel. Form 3 1/42

Harvey G. Higgins,
Attorney for Plaintiff.
448 So. Hill St. (605)
Los Angeles, California.
Address
Telephone: Mutual 5402.

(P. 123)

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

HUSBAND'S QUESTIONNAIRE

Attorneys representing the husband in domestic relations cases are requested to use this form in every such case involving attorney's fees, alimony pendente lite, a temporary restraining order, allowance for support and/or custody of children; it will be used as evidence upon any hearing thereon.

William F. Lucus, Plaintiff,
vs.
Edith Naomi Lucus, Defendant.

No. D-225 998.

Affidavit of Husband in Conformity with Request of Court in re Wife's Application for Attorney Fees, Court Costs, Alimony Pendente Lite, Allowance for Support. ~~and/or Custody of Children and Restraining Order.~~ (~~Strike out inappropriate portions.~~)

STATE OF CALIFORNIA, County of Los Angeles } ss.

William F. Lucus, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action that he has fully and fairly stated the facts of the case
(plaintiff or defendant)
to Harvey G. Higgins, Esq., his attorney, and that after such statement he is advised by such attorney and believes and upon that ground states that he has: (~~strike out inappropriate portion~~) (1) a good and sufficient defense upon the merits to his wife's alleged cause of action for Separate Maintenance (or) (2) a good and sufficient cause of action against his wife for Divorce; as will appear more fully from his Complaint & Answer to x-complaint on file herein to which reference is hereby made.

That he has read the following questions and makes the following answers and statements of facts as material evidence in this case.

1. Date of marriage December 26, 1935. Of separation January 1, 1941.
2a. What is wife's present total monthly income from all sources? $ 100.00
2b. What is your present total monthly income from all sources? None.
3a. What is your wife's present net financial worth? $5,000.00 3b. What is your present net financial worth? None.
4a. What is your wife's age? 46. 4b, Your age? 37.
5a. Has your wife any organic disease or major physical defect and if so, what? No.
5b. Have you any organic disease or major physical defect and if so, what? Yes. Spinal injury and two right fingers amputated.
6a. What are your wife's necessary monthly expenses? (Itemize and total):
Food $30.00
Transportation $ .00
Clothes $10.00
Rent none. Lives in own house. Rents upper flat $35.00
6b. What are your necessary expenses? (Itemize and total):
Have no expenses while living with mother and unemployed.
Was classed in draft 1-A. which prevented employment.

7a. What was your wife's net income from all sources, specify same, during the past year? (Give sources of information): U. S. Veteran Facility, $ 1,440.00

alao Rental from Upper 5 room flat at about $35.00 per month

7b. What was your net income from all sources, specifying same, during the past year?

Repair Mechanic at Compton Printing Co. until Sept. 25, 1942. $ 1500.-

Haven't been employed since Sept. 25, 1942.

8. Has your wife ever been employed, either before or after marriage? yes. If so, at what occupations and how much did she earn? office work.

9. When and where, if at all, was she last employed, by whom, and what were her earnings? U.S. Veteran facility at $ 1,440.00 per year.

10. Is your wife able to support herself? yes. Why? Able-bodied, always worked.

11. If you are not now entirely self-supporting state why not and when if at all you expect to be self-supporting: Out of employment since Sept 25, 1942.

12. Where and in what type of dwelling do you live? (Specify whether apartment, hotel, rooming house, flat, duplex, court bungalow or private house and give street number): Live at Anartment with my mother

13. How long have you lived there? 6 weeks If less than one year state where and in what types of dwellings you have lived for the past year: Heretofore lived in private house with my mother.

14. How many rooms do you occupy? 1

15. How many other persons live there and what is their relationship to you? Mother and self.

16. What rent, if any, do you pay? Nothing at present while unemployed.

17. What is your business, profession or occupation? repair mechanic.

18. How long have you been employed in it and where? 10 years. Compton Printing Co. until Sept 25, 1942.

19. If you receive a salary state how much it is and when paid: unemployed

20. Give the name, address and telephone number of your employer, if any:
Name Address
Phone

21. Give name, address and telephone number of your business or professional partners or associates:
Name Address Phone
Name Address Phone
Name Address Phone

22. What is the total fee you have paid and will pay your attorney in this case? Paid $40.00

23. State number, names and ages of minor children, of yourself and wife: None

24. Custody of children at present is as follows:

25. Where do you intend to house children and who with? Describe accommodations:

(P.124)

26. How much money per month is reasonably necessary for your wife's support and within your ability to pay? Nothing. Wife has steady position receives rentals.

27. How much additional money per month is reasonably necessary for the support of the children in, or requested by your wife to be placed in, her custody? --

28. I have filled out the financial statement forms hereunto attached and the statements therein are full, true and correct of my own knowledge except as follows:

29. Here state additional material facts, if any: (If restraining order is sought state here the facts you claim justify it, etc.)

30. Based upon the foregoing facts I declare that the following sums are the maximum amounts reasonably necessary and within my ability to pay.

(1)	For Wife's Attorney's Fees	$ None
(2)	For Wife's Court Costs	$ None
(3)	For Alimony pendente lite, per month Payable	$ None
(4)	For Support of Children per month Payable	$ --

31. I have answered each of the foregoing questions and given all the information called for as far as within my ability to do so and each answer and statement of fact is true of my own knowledge excepting only such as are stated to be upon information and belief and as to such latter I have stated the sources of my information and I verily believe the same to be true.

William Fern Larsen
Husband's Signature

Subscribed and sworn to before me, this December 29, 1942.

Harvey D. Ibsen
Notary Public, Los Angeles County, California.

J. F. MORONEY, County Clerk

By ....., Deputy

(OVER)

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(P. 125)

FINANCIAL STATEMENTS

Statement of all community property, both real and personal, belonging to husband and wife:

Cash in possession of wife $.....Cash in possession of husband $....none.....

No.	Description	Gross Value	Incumbrances	Gross Income	Fixed Charges	Net Income
	1941 Hudson Sedan	1,200.00	(?)			
	In possession of wife.					
	(husband has no automobile for personal use.)					

Statement of all separate property, both real and personal, owned by wife:

Home at 5'15 Riverton Drive	5,000.	2,400.00	35.00 mo.	
Wife lives in lower flat and rents upper flat at about $35.00 mo.				
Husband has contributed during marriage an equal share of the payments.				

Statement of all separate property, both real and personal, owned by husband:

NONE.

Received copy of within instrument.

Dated: January , 1942.

Attorney for defendant.

(P.124)

1-42-60M

DEFENDANT'S EXHIBIT NO. 4
PERSONAL RECORD

(Must be filled in by applicant with ink or indelible pencil)

S-2946-A

1. **Application for**
(Strike out words not applicable)

Employment as
~~Promotion to~~
Reinstatement as
Return from leave as

_____ (Occupation) _____ (Division or Department) _____ (Name of Company)

2. Name in full _____ (First, Middle and Last Name)

3. Present Address _____ (Number and Street) _____ (City) _____ (State)

4. If a minor, do you live with your parents? _____ If not, why? _____

5. Age _____ (Last Birthday) Date born _____ (Month, Day and Year) Where born _____ (City and State) Nationality _____

6. Height _____ ft. _____ in. Weight _____ lbs. Eyes _____ (Color) Hair _____ (Color) Complexion _____

7. Visible marks of identification or deformity _____

8. (Indicate by "X") Single ( ) Married ( ) Widow ( ) Widower ( ) Divorced ( )

9. Names of father and mother (If not living, so state) _____

Address _____

10. If unmarried and parents not living, give name, address and relationship of nearest relative _____

11. Names and addresses of two persons able to forward communications to you in event of your leaving service _____

12. Give complete record of your employment or whereabouts for the past five (5) years in regular order to present date. If unemployed exceeding thirty (30) days, or if employed by a relative, give names, addresses and businesses of two responsible persons, not employes of this company nor relatives, who can verify such statement and say where you were located during such period of unemployment. If engaged in business for yourself, explain nature of business, location, and give as references two business houses or banks with whom you transacted business. (To have been dismissed or requested to resign from a position does not necessarily mean you will not be employed by this company.)

FROM Mo.	FROM Yr.	TO Mo.	TO Yr.	OCCUPATION	MONTHLY SALARY (FILL IN IF INSTRUCTED)	NAME OF RAILROAD or Name and Address of Other Employer	R. R. DIVN. OR DEPT. and Where Employed or Kind of Business	NAME AND TITLE OFFICER UNDER WHOM EMPLOYED	REASON FOR LEAVING

If dismissed or requested to resign from any employment shown above, explain why.

APR 5 1946

U515

13. Have you ever been dismissed or requested to resign from any employment not shown under Q. 12? If so, name each position, cause, when and where.

N

14. Did you ever work for this Company before the time covered under Q. 12? If so, give dates, occupation, Division or Department, and cause of leaving _____ Did you then file personal record? _____

15. Names of those dependent upon you for support:

NAME IN FULL	AGE	RELATIONSHIP	EXTENT DEPENDENT	ADDRESS

16. Education—Schools or colleges attended: (If instructed, show under "Time Attended" month and year started and finished.)

SCHOOL	LOCATION	TIME ATTENDED	Graduated?	MAJOR SUBJECT (if any)

17. Do you understand that the use of intoxicants or narcotics is forbidden and that their use or the frequenting of places where they are sold is sufficient cause for dismissal? _____

18. Have you ever been injured?
If so, state how, when, where and nature of injuries. _____
Did you present claim? If so, how was it settled? _____

19. Have you ever employed or been represented by an attorney in connection with any claim or suit for damages against a railroad, street car company, or other employer? If so, state cause, name and address of attorney, company involved, and how settled.

N

N

20. Is your hearing good _____ Eyesight good _____ Able to distinguish colors _____ Health good _____ If chronic ailments, what are they? _____

21. **Do you understand** that if you enter the service it will be on **probation,** and that you can not be considered an accepted employe, unless the Company obtains satisfactory references and determines that in addition to your mastering the details of any job with which you may be intrusted, you possess the qualities: **honesty, loyalty, reliability, carefulness, courtesy, and the ability to get along pleasantly with fellow-workers?**

N

Do you understand that employment meantime is temporary and may be terminated by the company at its option, in which event **you agree** to be removed from service at once and without complaint, and will not ask for or expect to be informed of the nature or source of replies to inquiries regarding your previous record?

22. **I agree** to permit examination by the Company's physician to determine my physical fitness for employment; and if employed **I agree** to deduction of $1 examination fee from my wages or salary except when vaccination, at my expense and by physician of my own choice, is required. **I further agree,** if employed, to permit monthly pay roll deduction of Hospital fee.

23. Should I apply to the Company for treatment in illness or injury, the same shall be under the regulations existing or as amended of the Hospital Department, to be seen on application to General Officers, Superintendents, Company's Surgeons, Station Agents, or at Company's Hospitals, and **I agree** to acquaint myself therewith.

24. In consideration of my employment by the Company, **I agree** whenever I shall sustain or claim to have sustained any personal injury, while in the service of the Company, I will allow its surgeons, and any medical examiners it may select, to examine my person and body as often as the Company may deem necessary in respect to the actual or alleged injury, and **I hereby waive** all objections to such surgeons or medical examiners testifying whenever called upon by the Company, and **I further agree** that my refusal to allow any such examination to be made or testimony to be given shall be a bar to the institution or prosecution of any action on account of such injuries; and any action pending at the time of such refusal shall at once abate in consequence thereof.

25. **I hereby authorize** the company, and its officers, and the officers of any other company, person or firm by which I have been heretofore employed, to answer any or all inquiries as to my conduct and qualifications while in such employment, and, so far as they may know, the cause of my leaving the same.

Witness _____ (If employe, show title)

Location _____ (City) (State)

Applicant's Signature _____ (As usually written)

Date _____ (Month) (Day) 194 (Year)

References
Satisfactory
Not Satisfactory _____ Title

Account Number _____

Accepted
~~**Not Accepted**~~ _____ Title

4525

PLAINTIF'S EXHIBIT B

(AX) TELEGRAPHIC REPORT OF ACCIDENT

Instructions:—Use Signal "AX" to indicate to Receiving Operator to copy on Form 2979. This Signal gives precedence over other telegram. Operators in transmitting will send NUMBERS and ANSWERS only.

FROM ..... TIME ..... DATE .....

M. ..... 19 .....

TO .....

1. Date, time, weather .....
2. Near M. P. and station .....
3. Curve or straight track, ascending or descending grade .....
4. Train ..... Engine ..... Conductor ..... Engineer .....
5. Speed of train .....
6. Kind of accident ..... How many cars derailed .....
7. Cause of accident .....
8. Persons injured; name, occupation if employee, nature of injuries and days disability .....
9. If passenger, destination or stopover where interview may be had .....
10. Disposition made of injured persons .....
11. Help required ..... 12. East or west end of train .....
13. Kind and quantity of track, car, bridge or other material required .....
14. Is main track obstructed ..... 15. How long to clear main track .....
16. Is there a siding on which trains can pass ..... 17. Will temporary track have to be constructed .....
18. Delays to trains .....
19. Damage to track .....
20. Damage to engine ..... 21. Is engine derailed .....
22. Damage to cars: car number, location from head end, contents (if empty so state), destination, damage to car, damage to contents, state which if any will have to be transferred, and which cars derailed .....
23. Name and address of eye-witnesses of grade crossing accident .....
24. Remarks .....

1420

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SUPREME COURT, U.S.

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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947-1948

No. 793 54

HOWARD F. CORAY, ANCILLARY ADMINISTRATOR OF THE ESTATE OF WILLIAM FRANK LUCUS, DECEASED,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 793

HOWARD F. CORAY, ANCILLARY ADMINISTRATOR OF THE ESTATE OF WILLIAM FRANK LUCUS, DECEASED,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, A CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petition of Howard F. Coray, Ancillary Administrator of the Estate of William Frank Lucus, deceased, respectfully shows:

Summary and Short Statement of Matter Involved

The Supreme Court of Utah, in a three to one decision, denied petitioner his right of trial by jury guaranteed by the Constitution in an action arising under the Federal

Employers' Liability Act and the Federal Safety Appliance Act, where the evidence clearly demonstrated that respondent violated the Safety Appliance Act and that such violation, in part at least, caused decedent's death. Respondent admitted that it hauled and permitted to be hauled in interstate commerce PFE Car 29435 and that said car was equipped with a defective automatic air brake. It was stipulated "that it (the train) stopped because the triple union nut became disconnected from the triple valve on PFE Car 29435 due to the threads on the triple valve being worn" (R. 34). The failure of the triple valve permitted the air in the brakeline to escape to the atmosphere, thus causing the air brakes on the whole train to set at once in emergency. This brought the moving train to an unexpected, undesired, abrupt and sudden stop (R. 22-24). Within seconds thereafter a single man motor driven track car, upon which deceased, William Frank Lucus, respondent's signal maintainer, was riding, came into a violent rear end collision with the train and Lucus was killed.

Contrary to the will of Congress as expressed in the Federal Safety Appliance Act and the Federal Employers' Liability Act, Sections 1, 8, 9 and 51, Title 45, U. S. C. A., and to the holdings of this Court in controlling decisions construing said Acts, the trial court granted respondent's motion for a directed verdict of "no cause of action." The Utah Supreme Court affirmed on three grounds: (1) that there was no evidence which would justify a jury in finding that respondent's violation of the Federal Safety Appliance Act, either in whole or in part, caused the injury and death of Lucus; (2) that the "legal" cause of the death of Lucus was his own negligent act; (3) that the Federal Safety Appliance Act was not passed for the purpose of furnishing protection to an employee in the position and situation of Lucus immediately prior to the fatal collision.

Petitioner contends that in reaching this result the trial court and Supreme Court of Utah disregarded the controlling principles of law announced by this Court in *Spokane & I. E. R. Co.* v. *Campbell*, 241 U. S. 497, 36 S. Ct. 683, 60 L. Ed. 1125; *Grand Trunk Western R. R. Co.* v. *Lindsay*, 233 U. S. 42, 34 S. Ct. 581, 58 L. Ed. 838; *Louisville & Nashville R. Co.* v. *Layton*, 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931; *Union Pac. R. Co.* v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751; *Brady* v. *Terminal R. Assn. of St. Louis*, 303 U. S. 10, 58 S. Ct. 426, 82 L. Ed. 614; *Fairport, P. & E. R. Co.* v. *Meredith*, 292 U. S. 589, 54 S. Ct. 826, 78 L. Ed. 1446; *Anderson, Admx. of the Estate of L. C. Bristow, dec.* v. *The Atchison, Topeka and Santa Fe Ry. Co.* (decided April 26, 1948), not yet officially reported, but published in 16 L. W. 4375, reversing S. Ct. of California, 187 P. (2d) 729; *Minneapolis St. P. & S. S. M. Ry. Co.* v. *Goneau*, 269 U. S. 406, 46 S. Ct. 129, 70 L. Ed. 335; *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 692; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610; *Illinois C. R. Co.* v. *Skaggs*, 240 U. S. 66, 36 S. Ct. 249, 60 L. Ed. 528; *Minneapolis & St. Louis R. R. Co.* v. *Gotschall*, 244 U. S. 66, 37 S. Ct. 598, 61 L. Ed. 995; *White* v. *Central Vt. R. Co.*, 238 U. S. 537, 35 S. Ct. 865, 59 L. Ed. 1446. The Utah District Court and Supreme Court rulings are also in conflict with the following United States Circuit Court decisions: *Eglsaer* v. *Scandrett*, 151 F. (2d) 562 (7 C. C. A. 1945); *Philadelphia & R. Ry. Co.* v. *Auchenbach*, 16 F. (2d) 550 (3 C. C. A. 1927), Cert. Den. 273 U. S. 761, 47 S. Ct. 476, 71 L. Ed. 878; *McCarthy* v. *Pennsylvania R. R. Co.*, 156 F. (2d) 877 (7 C. C. A. 1946) Cert. Den. 329 U. S. 812, 67 S. Ct. 635; *Southern Pacific Co.* v. *Ralston*, 67 F. (2d) 958 (10 C. C. A. 1933); *Pennsylvania R. R. Co.* v. *Cole*, 214 F. 948 (6 C. C. A. 1914); *Ander-*

son v. *Baltimore & O. R. Co.*, 89 F. (2d) 629 (2 C. C. A. 1937), Cert. Den. 402 U. S. 696, 58 S. Ct. 14, 82 L. Ed. 538.

In cases above cited this Court has declared that there can be, as matter of law and fact, a multiplicity of causes in any accident and that if any one of such causes is the result of the negligence or unlawful conduct of the carrier, an injured employee may recover under the Federal Employers' Liability Act.

The Utah Court refused to recognize or properly construe and apply that provision of the Federal Employers' Liability Act which grants remedy for injury sustained by an employee *resulting in whole or in part from the negligence or unlawful conduct of the carrier.* The Utah Court ruled that, as matter of law, there can be but one "legal" cause of an accident, which precludes any and all other causative factors from being considered as causing, either "in whole or in part" the injury or death complained of. By its holding the Utah Supreme Court has eliminated the significant phrase "in whole or in part" from the Federal Employers' Liability Act. The Utah Court's decision herein deprives railroad workers of substantial benefits and rights and takes from them a large portion of the relief granted them by Congress.

Jurisdictional Statement

(a) Jurisdiction to grant this petition is sustained by Section 237 of the Judicial Code, as amended, subparagraph (b), Section 1, Chapter 229, 43 Statutes 937, Title 28, U. S. C. A. Section 344.

(b) The Statutes of the United States applied by the Supreme Court of the State of Utah are 45 U. S. C. A., Sections, 1, 8, 9, 51 and 53; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404.

(c) The judgment of the Supreme Court of Utah was rendered on October 31, 1947. It is set forth at (R. 97), is not yet officially reported in the Utah Reports, but appears at 185 P. (2d) 963. The petition for rehearing was denied February 10, 1948 (R. 98). This petition for certiorari was filed May 10, 1948.

Questions Presented

The questions presented are whether the Supreme Court of Utah properly applied the Federal Safety Appliance Act and the Federal Employers' Liability Act, or whether the rulings and applications made by it are inconsistent and in conflict with controlling decisions of this Court. The Utah Court held in this case that petitioner was not entitled to have the issues of his cause submitted to a jury because: (a) the admitted violation of the Federal Safety Appliance Act by respondent, as matter of law, did not, either in whole or in part, cause the death of Lucus; (b) the "legal cause" of the death of Lucus, as a matter of law, was his own negligent act; (c) Lucus was not a person for whose protection the Safety Appliance Act was passed, and, therefore, respondent's admitted violation of the Act could not impose liability for his death.

Reasons Relied On for Allowance of Writ

The Supreme Court of Utah has decided a Federal question of substance and importance in a way not in accord with controlling decisions of this Court. It has refused to allow a jury to pass upon substantial questions of fact relating to causation where the evidence and reasonable inferences adequately supported petitioner's claim. The Supreme Court of Utah has abdicated its sworn duty to protect petitioner in the enjoyment of his right of trial by jury guaranteed by the Constitution. It has usurped the

functions of the jury contrary to the repeated admonitions of this Court. It has allowed, sanctioned and permitted, and by its decision has made the outlawed defense of contributory negligence a complete bar to recovery in an action arising under the Safety Appliance Act and the Federal Employers' Liability Act, and has deprived the petitioner of substantial rights and benefits conferred by the Federal Safety Appliance Act and the Federal Employers' Liability Act.

It is essential that a Writ be granted in order to determine important questions relating to the construction, interpretation and application of the Federal Employers' Liability Act and Federal Safety Appliance Act in Utah, and specifically to determine whether or not the Utah Supreme Court will be permitted to construe and apply the Federal Employers' Liability Act and Federal Safety Appliance Act in a manner contrary to the decisions of this Court and other Federal Courts construing them as it has done in the past. See *Ehalt* v. *McCarthy, et al.*, (1943), 104 Utah 110, 138 P. (2d) 639; *Pauly* v. *McCarthy, et al.*, 109 Utah 398, 166 P. (2d) 501, reversed by this Court in 330 U. S. 802, 67 S. Ct. 962, 91 L. Ed. 1261; *Wilkerson* v. *McCarthy, et al.*, 187 P. (2d) 188; and the decision of the Utah Court in this cause.

Prayer

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the Supreme Court of the State of Utah commanding said Court to certify and send to this Court a transcript of the record in the case entitled *Howard F. Coray, Ancillary Administrator of the Estate of William Frank Lucus, deceased, Plaintiff and Appellant*, v. *Southern Pacific Company, a corporation, Defendant and Respondent*, No. 6967, including also the proceedings in said Supreme

Court, to the end that said cause may be reviewed and determined by this Court and the judgment of the Supreme Court of Utah reversed and the cause remanded for jury trial in accordance with law.

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Ancillary Administrator of the Estate of William Frank Lucus, deceased;
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Courts Below

The decision of the trial court was made and entered on the 6th day of April, 1946. The Opinion of the Supreme Court of Utah as set forth at R. 79 to 97, is not yet officially reported in the Utah Reports but appears at 185 P. (2d) 963.

Grounds on Which Jurisdiction of Supreme Court of the United States Is Invoked

The judgment of the Supreme Court of Utah was rendered on October 31, 1947 (R. 97). Petition for Rehearing was denied on February 10, 1948 (R. 98). Petition for Writ of Certiorari was filed on May 10, 1948. The judgment of the Supreme Court of Utah is based on its application of the United States Statutes commonly called the Federal Safety Appliance Act and Federal Employers' Liability Act, 45 U. S. C. A., Secs. 1, 8, 9, 51 and 53. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 937; 28 U. S. C. A., Sec. 344, and the Act of February 13, 1925, c. 229, Sec. 8; 43 Stat. 940; 28 U. S. C. A., Sec. 350.

Statement of the Case

William Frank Lucus, an employee of respondent, 39 years of age at the time of his death, was fatally injured while engaged in the performance of his duty as a signal maintainer on the main line track of respondent at a point approximately 3600 feet east of the east switch at Lemay, in Box Elder County, Utah, on the afternoon of the 24th day of May, 1944. Howard F. Coray, ancillary adminis-

trator, filed suit in the District Court of Weber County, Utah, and following trial before a jury the trial court granted respondent's motion for directed verdict of no cause of action and judgment was entered accordingly (R. 12, 13).

Respondent was charged with operating its eastbound freight train, First 582, consisting of 82 freight cars, a caboose and an engine, in violation of the Federal Safety Appliance Act,[1] in that it hauled and permitted to be hauled and used in interstate commerce PFE Car No. 29435 at a time when the threads on the triple valve were so badly worn that the triple union nut became disconnected from the triple valve, allowing the air in the brakeline to escape to the atmosphere, thus causing the automatic air brakes on each car in the train to be set at once in emergency, bringing the moving train to an unexpected, undesired, abrupt and sudden stop; that seconds after the stop the track car, upon which deceased was riding, violently collided with the rear end of the train, causing his death.

There was no particular conflict in the testimony. The evidence conclusively demonstrated that respondent was guilty of the charged violation of the Safety Appliance Act. It was stipulated that the train stopped because the triple union nut became disconnected from the triple valve on PFE Car 29435 due to the threads on the triple valve being worn (R. 34). This caused the air in the train line to escape to the atmosphere, immediately setting the automatic air brakes on all of the cars in the train in emergency, bringing the train to an abrupt, undesired and sudden stop. Within seconds of the stop the track car, upon which decedent was riding, crashed into the rear end of the train.

Darrel E. Jorgensen was the conductor on respondent's eastbound Train First 582 at the time of the accident (R. 21). His orders were to take the train onto the siding east

[1] The pertinent sections of the Federal Employers' Liability Act, and of the Federal Safety Appliance Act are set forth in Appendix "A".

of Newfoundland and permit westbound passenger train Fifth 87 to go by and eastbound passenger Train 28 to pass (R. 21, 22). At the time of the accident the crew was "making a run" for the siding (R. 22). When First 582 reached a point about 3600 feet east of the east switch at Lemay, the triple valve of the PFE car failed and the train was thereby brought to an unexpected emergency stop (R. 22-24).

Alvin O. Lynch testified that he was riding on the track car with deceased at the time of the accident; that he first met Lucus at about 1:00 or 1:30 p. m.. that day and was going to take over the signal maintaining job at Lemay, and that he was not acquainted with the job, nor his territory (R. 46, 47). That afternoon Moss, the boss, told him to go with Lucus and look the territory over. They were traveling on a one-man flat-top motor car (R. 47); he was sitting on the south side and Lucus on the north. Lucus was running the car. They traveled east on the north siding to the east switch and there waited until First 582 went by. They then placed the car on the eastbound main line track and proceeded eastward behind the train (R. 48, 49). The rear end of the freight train was then three or four hundred yards away. After Lynch boarded the car he turned his back to Lucus and saw him no more and no conversation passed between them. The purpose of his trip was to familiarize himself with the signals. He never noticed the train after the track car was placed in motion. He thought they had traveled about one-half or three-fourths of a mile when the accident occurred. He did not know what the speed of the car was, but did not think the speed excessive (R. 50).

While the car was traveling he was looking west toward the block signals to see when they cleared. He stated (R. 53):

> "It cleared after that train passed the battery cut west of Lemay. There is a train going west and one

coming east. We were following the eastbound. I was watching the signal this westbound train was holding" (R. 53).

It is a fair inference that Lucus likewise directed his attention toward the block signal. He was looking toward the west when first observed by Jorgensen (R. 24).

When the track car came into collision with the rear end of the train Lucus was thrown clear of the car and off to the north of the tracks; he was dead when picked up.

Jorgensen was of the opinion that the train was traveling between 25 and 30 miles per hour at the time the brakes were set in emergency by the failure of the triple valve on the PFE car (R. 26). He stated that when he first saw the track car it was in the neighborhood of ten car lengths or about 500 feet behind the train (R. 24).

Jorgensen testified that when the train started to stop, "I looked up and saw that we didn't have any air in the caboose gauge and I turned to the back of the train and saw this motor car coming and Anderson said 'Good God Swede those guys aren't going to get stopped' and we went out to the back and tried to stop them" (R. 23).

Brakeman Agricola testified (R. 44):

> "Q. How much time had elapsed between the time when Anderson said something about 'We are going to get hit' and the time when you did get hit?
>
> "A. Well, it wasn't much time, I would say seconds" (R. 44).

At the conclusion of the presentation of the evidence respondent made a motion for a directed verdict, the pertinent parts of which are set forth in footnote.[2]

[2] "Comes now the Defendant, Southern Pacific Company, after each of the parties have rested, and moves the Court for an order directing the jury to return its verdict in favor of the defendant and against the plain-

The District Judge granted the motion and stated (R. 12):

> "It is the opinion of the court that Mr. Lucus—one who was in the position he was in at the time of the accident, the Act didn't apply to him" (R. 12).

The Utah Supreme Court affirmed on the first, second and fourth grounds stated in the motion.

Specification of Errors

The Supreme Court of Utah committed prejudicial and reversible error in affirming the trial court's judgment on the directed verdict of no cause of action for the following reasons:

1. The respondent's admitted violation of the Federal Safety Appliance Act was a violation of duty to its employee, William Frank Lucus, as matter of law.

2. Respondent's admitted violation of the Federal Safety Appliance Act "in whole or in part" caused the death of William Frank Lucus.

---

tiff, no cause of action, for the following reasons and upon the following grounds:

"First: That there is no evidence in the record which would justify a finding by a jury that anything done or omitted by the defendant caused or contributed proximately to the injury and death of William Frank Lucus.

"Second: The evidence establishes, without conflict and as a matter of law, that the sole proximate cause of the death was the inattentive and careless manner in which Lucus drove and operated the motor car in question.

. . . . . .

"Fourth: It appears, as a matter of law, that the disconnection of the triple union nut from the triple valve was not a contributing cause or the cause of the collision at the rear end of the train, and further, that the Safety Appliance Act in question was not passed for the purpose of furnishing protection to one in the situation in which Frank Lucus was employed and engaged at the time of the rear-end collision" (R. 10, 11).

3. In eliminating respondent's admitted violation of the Federal Safety Appliance Act as a causative factor and determining the cause of Lucus' death as matter of law, the Utah courts have usurped the functions of the jury.

ARGUMENT

Point I

Respondent's admitted violation of the Federal Safety Appliance Act was a violation of duty to its employee, William Frank Lucus, as matter of law.

It is conceded in the decision of the Utah Supreme Court that respondent was in violation of the Federal Safety Appliance Act at the time of the accident resulting in Lucus' death. The court further concedes and states that a violation of the Federal Safety Appliance Act imposes liability upon a carrier for any injury to an employee caused, in whole or in part, by such violation. The court then goes on to hold that there was no breach of duty by respondent toward its employee, William Frank Lucus, because the requirement of the Safety Appliance Act, that all trains be equipped with safe and proper air brakes, is for the protection of employees on moving trains and not to protect against injury from standing trains. We quote from the opinion (R. 88):

> "• • • The provisions of the act are for the purpose of protecting those—the crew of the train and others, whose safety would be endangered if the train could not be stopped; not of protecting other employees because the train was stopped by the brakes." (R. 88)

And again

> "• • • But the objective of the statute, insofar as brakes might be concerned, is not to protect employees from standing, but from moving trains." (R. 88)

We do not hesitate to state that this holding stands alone amongst authorities and represents all that is extreme, narrow and unreasonable in the interpretation and application of these Federal Acts, and that it is contrary to the spirit of all controlling decisions. Long and diligent search has failed to expose any other decision which has gone to the ridiculous extremes reached here. The United States Supreme Court has held that close and doubtful cases should go to the jury.

In this case, where there can be no real doubt as to the existence of a closed causal connection between the admitted violation of the Act and the death, the Supreme Court of Utah resolved the questions of liability as matters of law. Consider the following language of this Court in the case of *Lilly* v. *Grand Trunk Western R. Co.*, 317 U. S. 481, 63 S. Ct. 347:

> "The Act, like the Safety Appliance Act, 45 U. S. C. A. Sec. 1 et seq., is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment."

In that case this Court sustained a judgment for the plaintiff and in so doing reversed the Appellate Court of the State of Illinois where it appeared that decedent fell from the tender of a locomotive due to ice on the deck and plaintiff was completely unable to show or prove that the ice upon the deck was there as a result of any negligent act or omission on the part of the railroad company.

The basic ruling of the court herein is much narrower and more unreasonable than the rule which respondent urged the United States Supreme Court to adopt in the *Lilly* case to the effect "* * * that the Act covers only defects in construction or mechanical operation and affords no protection against the presence of dangerous objects or foreign matter." The Court recognized and disagreed with

the contention of respondent in that case as being one which sought a narrow and constricted interpretation and application of the Act. It is respectfully submitted that the Utah court has adopted a view here which does violence to the repeated admonition of this Court that the Safety Appliance Act is to be liberally construed in the light of its prime purpose to afford protection to employees and others.

In *Louisville & Nashville R. Co.* v. *Layton*, 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931, the essential facts were: A train of many cars, standing on a switch track, was separated by about two car lengths from five loaded coal cars on the same track. An engine, pushing a stock car ahead of it, came onto the track and failed in an attempt to make a coupling with the five cars, but struck them with such force that the five loaded cars were driven over the intervening space and into violent collision with the standing train and plaintiff, who was on one of the five cars for the purpose of releasing the brake, was thrown to the track and injured. Plaintiff based his suit upon an alleged violation of the Coupler Act. Defendants contended that the violation was not available to plaintiff because he was not engaged in a coupling operation at the time of his injury. This Court sustained plaintiff and stated (37 S. Ct. 457):

> "• • • The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in, or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause of injury to them when engaged in the discharge of duty."

In *Brady* v. *Terminal R. Ass'n of St. Louis*, 303 U. S. 10, 58 S. Ct. 426, 429, 82 L. Ed. 614, the plaintiff brought an action under the Federal Safety Appliance Act to recover for injuries received by him; he was not an employee of the defendant, but received his injuries while inspecting cars in defendant's yards which were to be subsequently delivered to his employer. The defendant claimed that plaintiff was not entitled to the protection of the Act because he was not its employee at the time of the injury. This Court sustained plaintiff's contention holding that he came within the protection of the Act.[3]

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[3] "• • • We have said that 'the nature of the duty imposed by a statute and the benefits resulting from its performance' usually determine what persons are entitled to invoke its protection. It was in this view that we held that the power brakes required by the Safety Appliance Act were not only for the safety of railway employees and passengers on trains but also travelers on the highways at railway crossings.' Fairport, P. & E. R. Co. v. Meredith, 292 U. S. 589, 596, 597, 54 S. Ct. 826, 829, 78 L. Ed. 1446. In the instant case, petitioner in the course of his duty would have occasion to go upon the cars and use the grab-iron, and accordingly the benefit of the statute would extend to him, although he was not employed by the carrier holding the car in use, unless he was outside the scope of the statute because of the special character of his work. His work was that of inspection to discover defects of the sort here found to exist as well as others.

"This final question must be determined in the light of the nature of the obligation resting upon the carrier in relation to the use of a defective car. The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one, and the carrier is not excused by any showing of care, however assiduous. St. Louis, Iron Mountain & S. Rwy. Co. v. Taylor, 210 U. S. 281, 295, 28 S. Ct. 616, 52 L. Ed. 1061; Chicago, Burlington & Quincy Rwy. Co. v. United States, 220 U. S. 559, 570, 31 S. Ct. 612, 55 L. Ed. 582; Louisville & Nashville R. Co. v. Layton, 243 U. S. 617, 620, 621, 37 S. Ct. 456, 457, 61 L. Ed. 931; Great Northern Railway Co. v. Otos, supra. The breadth of the statutory requirements is shown by the fact that it embraces all locomotives, cars and similar vehicles used on any railway that is a highway of interstate commerce and is not confined exclusively to vehicles engaged in such commerce. Southern Railway Company v. United States, 222 U. S. 20, 32 S. Ct. 2, 56 L. Ed. 72. Laying down this comprehensive rule as a matter of public policy, Congress has made no exception of those employed in inspecting cars. The statute has been liberally construed 'so as to give

In *Fairport, P. & E. R. Co.* v. *Meredith*, 292 U. S. 589, 596, 597, 54 S. Ct. 826, 829, 78 L. Ed. 1446, this Court held that the power brakes required by the Federal Safety Appliance Act were not only for the safety of railway employees and passengers on trains but also travelers on the highways at railway crossings.

Unexpected, unscheduled and sudden stops, such as occurred in this case, increase the dangers of railroading. Such stops are not only dangerous to employees riding upon the stopping train, but to employees who may be required, in the performance of their duties, to travel upon the same tracks in the wake of such trains. It would be absurd to claim that rear end collisions are not a common type of railroad accident. Several cases which have arisen out of rear end collisions are cited in this brief. See *Union Pacific R. Co.* v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751. The unexpected, unnecessary and sudden stop of First 582 was caused by the respondent's admitted failure to obey the Federal Safety Appliance Act and respondent became liable in damages to every employee suffering injury caused, in whole or in part, by such violation. On this point the Act is explicit and apparently there is no authority to the contrary. At least, the Utah court was unable to find a single decided case to support its strange and labored conclusion.

It is respectfully submitted that the Utah Supreme Court's decision withholding from decedent the protection

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a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the act.' Swinson v. Chicago, St. P. M. & O. Rwy. Co., 294 U. S. 529, 531, 55 S. Ct. 517, 79 L. Ed. 1041, 96 A.L.R. 1136. In Davis v. Wolfe, 263 U. S. 239, 243, 44 S. Ct. 64, 66, 68 L. Ed. 284, reviewing the earlier cases, the court held that one can recover 'if the failure to comply with the requirements of the Act is a proximate cause of the act resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection" (58 S. Ct. 429).

of the Federal Safety Appliance Act is without support in reason or legal precedent and should be reversed.

Point II

Respondent's admitted violation of the Federal Safety Appliance Act "in whole or in part" caused the death of William Frank Lucus.

The following quotation from the Utah Court's decision reveals its misunderstanding of the legal concept of causation under the Federal Employers' Liability Act and Federal Safety Appliance Act (R. 86, 87):

> "This is not to say that a defect in the air line which causes the air to be released and the train to be brought to an emergency stop, may not be *the legal cause of injuries resulting to an employee.* Clearly, it may. Thus, in Minneapolis & St. Louis R. R. Co. *v.* Gotschall, 244 U. S. 66, 37 S. Ct. 598, 61 L. Ed. 995, where a brakeman, walking along the top of a train of cars was thrown off and killed, when the train separated because of the opening of a coupler on one of the cars, resulting in an automatic setting of the emergency brakes and a sudden jerk; it could not well be said that the failure of the coupler was not *the legal cause of the brakeman's death.* Likewise, in the case of Chesapeake & Ohio Ry. Co. *v.* Smith, 42 F. 2d 111, cited by appellant. There the train came to an emergency stop of such violence that it threw the brakeman through the panel of the front door of the caboose, and tore loose the furniture and stove. In such case the immediacy of the result *leaves no room for speculation as to its cause.*
>
> "But here, the stopping of the train—whether because of the defect in the triple valve, or a proper application of the braking power—was but the creation of a condition upon which the negligence of plaintiff's intestate operated. It was not *the legal cause of the result.* Had the train been intentionally stopped because of a defective appliance, and the same eventuality

had transpired, could it be found that the railroad's violation of the Safety Appliance Act *was the legal cause of the death* of plaintiff's intestate? Had the engineer of the train noticed a 'hot box' and had brought the train to a stop in order to have it remedied, and the track car collided with the train, the defective journal box would have been *the cause of the stop,* but that cause produced a non-negligent condition; that is, a condition or situation which of itself violated no duty owing to the men on the following track car.

"Viewed from the standpoint of negligence, the railroad company was not negligent toward plaintiff's intestate *in failing to comply with the Safety Appliance Act relative to the locomotive furnished to the crew of the train.* Viewed from the standpoint of causation: Looking back from the harm to the actor's negligent conduct, it appears highly extraordinary that the negligent conduct should have brought about the harm. See Restatement of the Law of Torts, Negligence, Sec. 433." (Italics ours)

The Utah court's frequent use of the phrase "legal cause" illustrates what petitioner conceives to be the fundamental and basic error of the court's decision. The Utah Supreme Court in this decision refuses to recognize and give meaning to the significant words of the Federal Employers' Liability Act "in whole or in part." It refuses to accept the realistic concept that accidents can, and usually do, have a number of causes. The concept of multiplicity of causes implicit in the words "in whole or in part" has been repeatedly sanctioned and applied both by this Court and by the circuit courts. The Utah court's resurrection of the absolute defense of contributory negligence by calling such conduct the "legal cause" is contrary to every Federal authority petitioner has been able to discover. The phrases "legal cause" and "proximate cause" are foreign to the Federal Acts in question; neither phrase is used in any section of the Acts. They are used and em-

ployed by the Utah court to obscure reason and justify a result not otherwise obtainable. The train was brought to a sudden, unexpected stop by an admitted violation of the Federal Safety Appliance Act, and the track car following the train thereupon crashed into it and an employee was killed. The Utah court removes the violation as an "in whole or in part" cause of the death by a confusing play on these meaningless phrases. The accomplishment of the Utah court in thus eliminating the violation of the Act as a cause is nothing short of an act of judicial legerdemain.

The Utah Supreme Court cites but one authority in support of its holding, *i.e.*, the American Law Institute, Restatement of the Law of Torts, Vol. II, and it is submitted that this authority does not support the reasoning of or the result reached by the Utah court, but on the contrary supports the contention of petitioner herein. In Section 433 the Institute enumerates four considerations to be used in determining cause. First: "*The number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it.*"

There were but two factors which contributed to the cause of Lucus' death; both are substantial: (1) Respondent's admitted violation of the Federal Safety Appliance Act which brought the train to an unexpected and sudden stop. (2) The failure of decedent to maintain a lookout ahead.

Petitioner's action being founded on respondent's violation of the Federal Safety Appliance Act, factor number 2 is removed from consideration by the express terms of the Federal Employers' Liabilty Act.

Second: "*Whether after the event and looking back from the harm to the actor's negligent conduct, it appears highly extraordinary that it should have brought about the harm.*"

Viewing the stage as it was set immediately following the failure of the triple valve, the collision between the train and track car was practically inevitable. The unexpected

and sudden stop of the train created a dangerous situation. The collision was inevitable because of the fact that the men on the track car were engaged in watching the block signals. They had no reason to expect the train to stop when and where it did and they, therefore, failed to make a timely discovery of it. For a very pertinent analysis and comment supporting petitioner's contentions, see the "Comment on Clause (b):" page 1167 of the American Law Institute, Restatement of the Law of Torts, Vol. II, Sec. 433.

Third: "*Whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other force for which the actor is not responsible.*"

This is not a case where there is a chain of causation operating through a number of forces. The collision occurred directly and immediately following the unexpected stop of the train. Unless the distance separating the track car and the rear of the train was sufficient for Lucus to stop the track car, a collision was made inevitable by the stop, and even if the distance was sufficient the danger was ever present that he would not discover the stalled train in time.

Far from creating a situation harmless, the unexpected stop of the train under the circumstances here present created a situation fraught with great and immediate danger to decedent.

Fourth: "*Lapse of time.*"

The lapse of time between the failure of the triple valve and the collision was a matter of seconds only. There was certainly no time for new and independent causes to intervene.

A close and careful examination of the Utah Supreme Court's only authority, as we have demonstrated, can lead to but one conclusion, *i.e.*, that respondent's violation of the Federal Safety Appliance Act was a substantial causative

factor in the accident resulting in the death of Lucus, and, therefore, "in whole or in part" caused his death.

In the leading case, *Spokane & Inland Empire Railroad Co.* v. *Campbell*, 241 U. S. 497, 36 S. Ct. 683, 689, 60 L. Ed. 1125, this Court, speaking through Justice Pitney, stated:

> "Upon the whole case, we have no difficulty in sustaining his right of action under the employers' liability act. That act (Sec. 1, 35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, Sec. 8657) imposes a liability for injury to an employee 'resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, * * * or other equipment.' As was held in San Antonio & A. Pass R. Co. *v.* Wagner, decided June 5, 1916, 241 U. S. 476, 60 L. Ed. —, 36 Sup. Ct. Rep. 626, a violation of the safety appliance act is 'negligence' within the meaning of the liability act. And by the proviso to Sec. 3 of the latter act, no employee injured or killed shall be held to have been guilty of contributory negligence in any case where a violation of the safety appliance act 'contributed to the injury or death of such employee.' It is too plain for argument that under this legislation the violation of the safety appliance act need not be the sole efficient cause, in order that an action may lie. The circuit court of appeals (133 C. C. A. 370, 217 Fed. 524) held that the element of proximate cause is eliminated where concurring acts of the employer and employee contribute to the injury or death of the employee. We agree with this, except that we find it unnecessary to say the effect of the statute is wholly to eliminate the question of proximate cause. But where, as in this case, plaintiff's contributory negligence and defendant's violation of a provision of the safety appliance act are concurring proximate causes, it is plain that the employers' liability act requires the former to be disregarded."

In the above case the court considered a situation where an engineer, in disregard of written orders, took his train onto a track over which another train was then approaching from the opposite direction. The jury, in answer to special interrogatories, found:

(1) That Campbell received orders which did not permit him to proceed onto the track where he was injured.

(2) That the air brakes on his train were defective.

(3) That Campbell's violation of orders proximately caused the accident.

This Court affirmed a judgment in favor of plaintiff, and in speaking of finding (3), said:

> "* * * From the fact that he disregarded and in effect violated the order as actually communicated to him, it, of course, does not necessarily follow that he did this wilfully. The jury was not bound to presume—it would hardly be reasonable to presume—that he deliberately and intentionally ran his train out upon a single track on which he knew an incoming train with superior rights was then due. However plain his mistake, the jury reasonably might find it to be no more than a mistake attributable to mental aberration, or inattention, or failure for some other reason to apprehend or comprehend the order communicated to him. In its legal effect this was nothing more than negligence on his part, and not a departure from the course of his employment" (36 S. Ct. 683, 689).

How much less blameworthy was the conduct of Lucus, who was following a train which he had every reason to believe would continue on its way until it reached a station or a siding.

Another factor bearing on the conduct of Lucus was the nature of his duties under his employment. He was a signal maintainer and it was not only a matter of great con-

cern and interest to him to observe the operation of the block signals as actuated by both eastbound and westbound trains, but a matter of duty under his employment as well. Lynch, the new signal maintainer, testified that his attentions were focused on the block signals watching to see when they changed. A jury would be fully justified in finding that Lucus' attention was likewise absorbed by the operation of the signals. Decedent was certainly not skylarking or indulging in horseplay at the time of the collision. But it would, however, seem entirely unprofitable to examine the nature of Lucus' conduct. It could amount to nothing more than contributory negligence, which is completely immaterial here.

It was through the respondent's violation of the Federal Safety Appliance Act that the track ahead became blocked at a time when Lucus had every right to expect it to be clear. It is impossible for petitioner to discover any way in which respondent's admitted violation of the Federal Safety Appliance Act can be eliminated as a substantial causative factor in the resultant accident or by which decedent's conduct can become the sole proximate cause thereof.

In its consideration of the case, the Supreme Court of Utah must have completely ignored the reasoning of this Court in *Union Pacific R. Co.* v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 319, 62 L. Ed. 751. There defendant sought to avoid liability for the death of one of its employees on the ground that it conclusively appeared from the evidence that the employee remained in the caboose of the stalled train when his duty required him to proceed back along the track to protect by flagging. But for his own negligent failure in the performance of duty his death would not have occurred. Justice Holmes replied to this argument in the following language:

> "But it is said that, in any view of the defendant's conduct; the only proximate cause of Cradit's death

was his own neglect of duty. But if the railroad company was negligent, it was negligent at the very moment of its final act. It ran one train into another when, if it had done its duty, neither train would have been at that place. Its conduct was as near to the result as that of Cradit. We do not mean that the negligence of Cradit was not contributory. We must look at the situation as a practicel unit rather than inquire into a purely logical priority. But even if Cradit's negligence should be deemed the logical last, it would be emptying the statute of its meaning to say that his death did not 'result in part from the negligence of any of the employees' of the road" (38 S. Ct. 319).

To like effect see: *Illinois C. R. Co.* v. *Skaggs*, 240 U. S. 66, 36 S. Ct. 249, 60 L. Ed. 528.

The answer to the Utah Supreme Court's holding that the stopped train was merely a condition and, therefore, respondent's violation of the Federal Safety Appliance Act ceased to be a concurring cause is found in the opinion of this Court in the case of *Grand Trunk Western R. Co.* v. *Lindsay*, 233 U. S. 42, 34 S. Ct. 581, 583, 58 L. Ed. 838. In that case the plaintiff, a switchman, was attempting to make a coupling. The couplers failed to couple on impact and several unsuccessful attempts followed. Thereupon plaintiff went between the cars to ascertain, and, if possible, remedy the trouble. While he was between the cars the engineer started the engine and plaintiff was injured. Discussing the problem of causation this Court, speaking through Chief Justice White, stated:

"* * * But having regard to the state of the proof as to the defect in the coupling mechanism, its failure to automatically work by impact after several efforts to bring about that result, all of which preceded the act of the switchman in going between the cars, in the view most favorable to the railroad, the case was one of concurring negligence; that is, was one where the injury complained of was caused both by the failure of

> the railway company to comply with the safety appliance act and by the contributing negligence of the switchman in going between the cars" (34 S. Ct. 583).

The decision of the Utah Court on the matter of causation is contrary to all the decisions we have discovered from the Circuit Courts. In several recent cases the Circuit Courts have had occasion to discuss and pass upon the legal concept of causation under the Federal Employers' Liability Act, and especially upon the meaning of the phrase "in whole or in part" as those words are used in the Act.

In discussing contributory negligence set up as sole proximate cause under the Federal Safety Appliance Act, the Third Circuit Court of Appeals in *Philadelphia & R. Co.* v. *Auchenbach*, 16 F. (2d) 550, 551, 552, Cert. Den. 273 U. S. 761, 47 S. Ct. 476, 71 L. Ed. 878, stated:

> "If his act amounted to negligence it was no more than contributory negligence which was removed from consideration by the Act. Chicago G. W. R. R. Co. *v.* Schendel, supra; Auchenbach *v.* P. & R. R. Co., supra. Moreover, it is the law that a violation of the Act need not be the sole efficient cause in order that an action may lie. So also the element of proximate cause is eliminated where concurrent acts of the employer and employee contribute to the injury. Spokane & Inland E. R. Co. *v.* Campbell, 241 U. S. 497, 510, 36 S. Ct. 683, 60 L. Ed. 1125; Pless *v.* N. Y. Central R. R. Co., 189 App. Div. 261, 179 N. Y. S. 578, affirmed, 232 N. Y. 523, 134 N. E. 555. In this situation, where there was nothing to show that the plaintiff's contributory negligence, if any, was other than negligent concurrent with that of the defendant, it follows that an issue of the plaintiff's contributory negligence with its underlying issue of proximate cause was eliminated from the case and, in consequence, evidence to prove it was properly rejected" (16 F. (2d) 551, 552).

Eglsaer v. *Scandrett*, 151 F. (2d) 562, 565, 566 (7 C. C. A., October 25, 1945), was an action brought under the Federal Employers' Liability Act for the death of plaintiff's decedent, a railroad engineer. The evidence disclosed that while the train stopped deceased decided to repair the automatic bell ringer which had ceased to function automatically. He climbed out of the cab onto the catwalk on the right side of the engine. When the train was ready to proceed it was discovered that he was on the ground on the left side of the cab unconscious. The jury's verdict was special, it found that the automatic bell ringer was in a defective condition, and that the failure to provide such ringer in good condition was a cause of the death. The trial court changed the jury's verdict on the issue of cause, holding that there was no evidence to support a finding of violation of the Boiler Inspection Act by defendant contributing as a cause of death. The Circuit Court reversed, holding that the evidence was sufficient to support a finding that the carrier's violation of the Federal Safety Appliance Act was "in part" the cause of the engineer's death. The discussion of the Court is set forth for convenience in footnote.[4]

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[4] "* * * it seems clear, in the light of the provisions above abstracted, that the liability statute definitely recognizes the complex causal basis of most injuries, and, in effect, states that if, among the several factors which have combined to produce an injury within the purview of the statute, there shall be found *any negligent act or omission on the part of the carrier to which such injury was in part due, then liability for such injury shall fall upon the carrier.*'

"'The statute does not attempt to legislate upon the purely logical problem of determining the cause or causes of injury, but directs its mandate towards the problem of fixing liability for the injury. Logic may conclude that the injury resulted from the negligence of the employer, the employee's own want of care, the default of a stranger to the employment, an Act of God, or pure accident, or from a combination of any or all of these factors. But after logic has thus determined the causal basis of the injury, the statute steps in to say that if, among these causes, there is negligence on the part of the employer, as that term is understood in the act, liability of the employer shall follow,

In *McCarthy* v. *Pennsylvania R. Co.*, 156 F. (2d) 877 (7 C. C. A., 1946), Cert. Den. 329 U. S. 812, 67 S. Ct. 635, a defective locomotive caused injury to the engineer operating it. The condition of the engine had been called to the attention of the engineer several times and he had been advised to take it out of service before it broke down. There was adequate opportunity for an exchange of engines. Decedent ignored the warnings and continued to operate the engine until it derailed, turned over and killed him. The court, following *Spokane & Inland Empire R. Co. v. Campbell, supra,* held that the engineer's conduct was nothing more than contributory negligence or assumption of risk, neither of which barred recovery against the carrier.

The Utah Court not only reaches an erroneous result,

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irrespective of the other factors causally related in whole or in part from negligence, even if the negligence of the injured employee or some other factor was logically nearer to, or more influential in producing that injury. In the words of Mr. Justice Holmes: 'We must look at the situation as a practical unit, rather than inquire into a purely logical priority.'

"There have recently been before the Supreme Court two cases in which the evidence of alleged negligence of a railroad was deemed by the Circuit Court of Appeals to have been insufficient to warrant a verdict for the plaintiff. In the one, Tiller v. Atlantic Coast Line, 323 U. S. 574, 65 S. Ct. 421, the Supreme Court, without extended discussion, held that the District Court properly submitted to the jury the issues of lack of light and lack of warning as possible proximate causes of the injury. In the other case, Tennant v. Peoria & Pekin R. Co., 321 U. S. 29, 64 S. Ct. 409, 412, 88 L. Ed. 520, a case which arose from this court, the Supreme Court held the evidence sustained a jury's finding that failure to ring the bell before starting a locomotive was negligence on the part of the railroad and that such negligence was the proximate cause of the death.

. . . . . .

"Perhaps the reconciliation of the earlier accepted, sometimes called the old-fashioned idea, of 'proximate cause' as the direct or efficient cause of the accident (as would be the district court's illustration of a shock from

but its reasoning is in conflict with the reasoning found in every case we have examined. The Utah Court has even misapplied the sole authority it relied upon. It is submitted that a proper application of Sec. 433 of the American Law Institute Restatement of the Law of Torts would necessarily require a reversal of the Utah Court's decision. Without the support of the Restatement, the decision lacks both authority and reason. Petitioner's position is fortified by the cogent dissenting opinion of Justice Wolfe and his analysis of the causative elements in this case.

Point III

In eliminating respondent's admitted violation of the Federal Safety Appliance Act as a causative factor and determining the cause of Lucus' death as a matter of law, the Utah courts have usurped the functions of the jury.

There can be little doubt at this late date of this Court's intentions in regard to the right of a plaintiff to jury trial in cases brought under the Federal Employers' Liability

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a defective electric bell ringer causing injuries and death) in cases where this statute applies, and the conception of proximate cause which now obtains, is to be found in the enlarging phrase of the statute. It provides that if the railroad's negligence 'in part' results in the injuries or death, liability arises. Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has 'causal relation,'—if the injury or death resulted 'in part' from defendant's negligence, there is liability.

"The words 'in part' have enlarged the field or scope of proximate causes—in these railroad injury cases. These words suggest that there may be a plurality of causes, each of which is sufficient to permit a jury to assess a liability. If a cause may create liability, even though it be but a partial cause, it would seem that such partial cause may be a producer of a later cause. For instance, the cause may be the first acting cause which sets in motion the second cause which was the immediate, the direct cause of the accident (151 F. (2d) 565, 566).

Act. In *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520, where the question was whether the failure to give warning of the intended movement of a train could be found by the jury to be a cause of Tennant's death, this Court said (321 U. S. 34, 64 S. Ct. 412):

> "* * * The ultimate inference that Tennant would not have been killed *but for* the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life. The jury could thus find that respondent was liable 'for * * * death resulting in whole or in part from the negligence of any of the * * * employees.'" (Italics added.)

In the much cited case of *Bailey* v. *Central Vt. R. Co.*, 319 U. S. 310, 87 L. Ed. 1444, 63 S. Ct. 1062, 1064, this Court, in discussing, reviewing and sustaining this right, stated:

> "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.' Jacob *v.* New York, 315 U. S. 752, 86 L. Ed. 1166, 62 S. Ct. 852. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. *Reasonable care and cause and effect are as elusive here as in other fields.* But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. *To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.*" (Italics added.)

In the case of *Jacob* v. *City of New York*, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166, Mr. Justice Murphy, speaking for the Court, stated:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence, which is protected by the 7th amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the constitution or provided by statute, should be jealously guarded by the Courts."

In *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 451, 87 L. Ed. 610, this Court stated:

> "* * * Many years ago this Court said of the problems of negligence, 'We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones *v.* East Tennessee, etc., R. Co., 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478. Or as we have put it on another occasion, 'Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences,' the case should go to the jury."

In Footnote 30 of the *Tiller* case it is concluded:

> "It appears to be the clear Congressional intent that to the maximum extent proper, questions in actions arising under the Act should be left to the jury."

A jury could not ignore the substantial causative factor the unexpected stopping of the train played in causing the fatal accident. The unexpected stop was so obviously a cause of the collision that petitioner believes; under Sec. 53, Title 45, U. S. C. A. (Appendix "A"), he would have been entitled to a binding instruction on the matter of lia-

bility. But, even though the court might differ with us on this proposition, it is respectfully submitted that there can be no difference of opinion on the proposition that a jury question was presented by the evidence. By their rulings, the Utah courts have taken a case from the jury which is not close or doubtful, but a case wherein no conclusion seems possible other than that the charged and admitted violation of the Federal Safety Appliance Act by respondent contributed to the cause of the casualty complained of.

Causation is ordinarily a question for the jury. *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 692; *Illinois C. R. Co.* v. *Skaggs*, 240 U. S. 66, 36 S. Ct. 249, 60 L. Ed. 528; *Union Pacific R. Co.* v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751; *Spokane & Inland Empire R. Co.* v. *Campbell*, 241 U. S. 497, 36 S. Ct. 683, 60 L. Ed. 1125.

In this Court's most recent decision, *Doris Anderson, Admx. of the Estate of L. C. Bristow, deceased* v. *The Atchison, Topeka and Santa Fe Ry. Co.*, rendered April 26, 1948, not yet officially reported, but published in 16 L. W., reversing Supreme Court of California, 187 P. (2d) 729, it definitely and positively expressed its adherence to the rule protecting railroad employees in the full enjoyment of their right of trial by jury in actions arising under these Federal Acts:

> "* * * We are unable to agree that had petitioner been permitted to introduce all evidence relevant under her allegations, the facts would have revealed a situation as to which a jury under appropriate instructions could not have found that decedent's exposure and consequent death were due 'in whole or in part' to failure of respondent's agents to do what 'a reasonable and prudent man would ordinarily have done under the circumstances of the situation.' Tiller *v.* Atlantic Coast Line R. Co., 318 U. S. 54, 67. See also Jamison *v.* Encarnacion, 281 U. S. 635, 640, 641; Bailey *v.* Central

Vermont R. Co., 319 U. S. 350, 353; Blair *v.* Baltimore & O. R. Co., 323 U. S. 600, 604; Lillie v. Thompson, 332 U. S. 459, 461-462."

In the case of *Lillie* v. *Thompson*, 332 U. S. 459, 461-462, 68 S. Ct. 140, 142, cited in support of this Court's opinion in the *Anderson* case, *supra*, this Court reversed a judgment of the Sixth Circuit Court of Appeals dismissing the plaintiff's complaint (162 F. 2d 716), and in discussing the Circuit Court's holding that there was no causal connection between the injury and respondent's failure to light or guard the premises, wherein the petitioner, a young lady, was required to work in the nighttime, stated:

> "• • • That the foreseeable danger was from intention or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence, and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence."

The violation by respondent of the Act having substantially contributed to the cause of decedent's death, the question of causation was improperly withdrawn from the jury. The majority of the Utah Court thereby erroneously substituted its judgment for that of a jury and its error deprived petitioner of his constitutional right to a jury trial.

Conclusion

It is respectfully submitted that the opinion of the majority of the Supreme Court of Utah in this case is in conflict with the express provisions of the Federal Safety Appliance Act, the Federal Employers' Liability Act, and the controlling decisions of this Court and other Federal Courts construing those Acts; that a Writ of Certiorari should be granted in order for this Court to review the rec-

ord and the opinion of the Utah Court and finally reverse the same and remand the cause to the state courts for jury trial in accordance with the law.

Respectfully submitted,

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APPENDIX "A"

Section 1, Title 45, U. S. C. A.:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel-brake and appliances for operating the train-brake system or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

Section 8, Title 45, U. S. C. A.:

"The provisions and requirements of sections 1-7 of this title shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements relating to train brakes, automatic couplers, grab irons, and the height of draw bars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section 6 of this title, or which are used upon street railways."

Section 9, Title 45, U. S. C. A.:

"Whenever, as provided in sections 1-7 of this title, any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer

of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said 50 per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said sections, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section."

Section 51, Title 45, U. S. C. A.:

"Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. * * *"

Section 53, Title 45, U. S. C. A.:

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount

of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

CASE NO. 793

HOWARD F. CORAY, Ancillary Administrator of The Estate of William Frank Lucus, Deceased,

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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SUMMARY

William Frank Lucus, an employee of Southern Pacific Company, died as the result of running a small track car into the rear end of a standing train. He was operating the car east and looking west on a straight, level track. He waited by the side of the main line for the eastbound freight train to pass him and then put the track car on the main line and followed the train east. A nut on a valve in the air line became disconnected which applied all the brakes in the train. The train was traveling 25 to 30 miles per hour and it traveled about 1350 to 1800 feet after the brakes were applied before it stopped.

Lucus had no duties to perform which prevented him from giving his entire attention to the operation of the track car. The track car had a maximum speed of 25 to 30 miles per hour and would stop in 100 feet if the brakes had been applied, which was not done at any time before the collision. There is no doubt that Lucus had plenty of time to stop the track car if he had observed the train stopping. He had plenty of time to stop the track car if he had looked ahead after the train had stopped. He knew he was following the freight train so closely that if it should stop or slow down there would be a collision, unless he also stopped or slowed down. He did not expect the train to stop so he risked his life on the assumption it would not stop or slow down.

The Trial Court directed the verdict for defendant after both sides had rested. The Supreme Court of Utah affirmed. The decision below correctly applied the Federal Law to the facts.

STATEMENT OF THE CASE

May 24, 1944, was a clear, calm, sunny day. (R. 50.) At about 3:30 p. m. Lucus and Lynch put the motor car on the north siding and moved it to the east end of that siding and waited there while the freight train pulled out of the south siding onto the main line and proceeded east. (R. 48.) Lynch was going to replace Lucus as signal maintainer at Lemay. The track was straight and level from Lemay to the place where the collision occured. (See the photographs R. 131, 135.) After the freight train had passed Lucus and Lynch, they pushed the track car 40 or 50 feet and put it on the main track. (R. 49.) Then Lucus got on the north side, which was the operator's side, and Lynch pushed it 20 feet to start it. (R. 49.) They followed the train east. Lynch sat on the south side of the track car. The car was constructed for one man operation (R. 49), and Lucus was the operator. When Lynch hopped on the motor car after starting it, the rear end of the train was then 300 to 400 yards east of the motor car. (R. 50.) Lynch did not look east, but was watching the westbound

semaphore signal east of Lemay to familiarize himself with the territory which he was going to take over. (R. 51.) Lynch did not see what Lucus was doing after they left Lemay (R. 54) and had no conversation with Lucus. (R. 52.) Lynch was not seriously injured in the collision and gave his deposition at the trial. He testified the motor car was not traveling at an excessive speed. (R. 50) The motor car has a one cylinder motor powered for maximum speed of 25 to 30 m.p.h., and is equipped with brakes which would stop it within 100 feet at a maximum speed, and the brakes immediately before the accident were in good condition. (R. 71.) A rule of the defendant company provided that when following moving trains, track cars must remain not less than 400 feet to the rear of the same. (R. 72.) Lucus had no duties to perform on the trip other than to operate the motor car. He was going to deliver some pay checks to employees at stations east of Lemay. (R. 53)

The place of the collision was 3600 feet east of the east switch points at Lemay in Box Elder County, Utah. The deceased was a signal maintainer at Lemay. The tracks at Lemay run east and west and there are passing tracks north and south of the main line. (R. 18, 22.)

The freight train involved was known as first 582, consisting of 82 cars. At Lemay it had taken the south siding, and it pulled back on to the main line and proceeded east at about 3:30 p. m. (R. 21, 22, 50.) As it passed the east switch, Lucus and Lynch, who was with him on the motor car at the time of the accident, were waiting with their car to place it on the main line and follow it east as soon as the train had passed. (R. 48.)

After the train had proceeded a very short distance, the triple union nut on the triple union valve on the 60th car from the head end of the train became disconnected, and the brakes were immediately applied in emergency. The disconnection automatically sets all brakes in the train. (R. 27, 40, 74.) The train was going about 25 miles per hour when the brakes were applied. The train rolled to a smooth, sudden, but easy stop. There weren't any jerks. (R. 28, 39.) It was estimated by Brakeman Agricola,

who was on the caboose, that the train ran between 30 and 40 car lengths after the brakes went into emergency, which was 1350 to 1800 feet. The engine was working steam while the stop was being made, and it was made with no jar whatsoever. (R. 43, 44.) The freight cars in the train were approximately 45 feet in length. (R. 71.) The purpose of the air brakes is to stop the train, and the same kind of stop which occurred on this occasion would occur if the engineer had occasion to set the brakes in emergency. (R. 32.) After the train had come to a stop, Jorgensen, who was the conductor on the caboose, observed that the air gauge on the caboose showed the air pressure had left the line. (R. 23.) After a few seconds, Conductor Jorgensen observed the motor car about 500 feet from the rear of the train and traveling about 35 m.p.h. (R. 24.) Both men on the motor car were looking back toward Lemay (west). (R. 23, 24, 31.) There was no decrease in the speed of the motor car between the time Jorgensen first saw it and when it hit the caboose. (R. 31.) Anderson and Jorgensen on the caboose tried to stop the men on the track car, but could not get them to turn their heads. The collision occurred and Lucus was killed instantly. (R. 23.) Brakeman Law on the caboose also observed that both Lucus and Lynch were traveling east and looking west at the time of the accident. (R. 36.) Emergency stops of trains frequently occur. Engineers stop the train by full application of the air (emergency or "big hole" application) very often if any emergency arises.

ARGUMENT

Petitioner does not contend that Lucus was not negligent or that such negligence was not a proximate cause of his death. No reasonable mind could find that Lucus was exercising any care for his own protection. His conduct is important in the case not because his negligence is a defense if the failure of the air line was the proximate cause of his death, but because his failure to look under the circumstances was so highly extraordinary that it was not to be anticipated by the Respondent. Because of the

conduct of Lucus, the failure of the air line on the train is not the proximate cause of his death.

Brakeman Agricola testified the train took from 1350 to 1800 feet to stop. Its speed was about 25 miles per hour. Assuming a constant rate of deceleration of the train during the time it was stopping, it would average 12½ miles an hour which is 18.33 feet per second. At this rate it would take the train at least 73 seconds to stop. Some seconds elapsed before Jorgensen noticed the track car 500 feet away, approaching at 30 miles per hour, or 44 feet per second. The track car would take 11 seconds to travel the 500 feet and it seems fair to assume 15 seconds elapsed before Jorgensen noticed the track car. This adds up to 99 seconds from the time the brakes went into emergency until the collision, assuming the 1350 feet stopping distance instead of 1800 feet. That is not a long time under some circumstances, but it is a long time to ride backwards immediately behind a moving freight train at 30 miles an hour without looking ahead or slowing or stopping the track car.

It does not in any way justify the conduct of Lucus to say it was only a matter of seconds between the time the brakes were applied on the train until the collision occurred. If the time was short the duty was that much more imperative. If it had been a fact known to Lucus that there was no train on the track between Lemay and Newfoundland, the next station to the east, his failure to look might be understandable. If instead of running into the train he had run into a rock which had just rolled onto the track or some other object he had no reason to anticipate would be on the track, when he thought he had a clear track ahead, his conduct might be within the field where the railroad should anticipate he might act as he did. But Lucus knew he was following the train within 300 or 400 yards at 30 miles per hour. If he wanted for some reason to look back at Lemay, this was not a job which was so exacting upon either his time or attention that it precluded him from turning his head occasionally to see if there was a clear track ahead. If he wanted to

be free of the obligation to look ahead often enough to insure he would not run into the train if it stopped or slowed down, he could easily have slowed or stopped his motor car. No train was following him. He had a choice of slowing his car or stopping, or looking ahead to know how much clear distance he had. It was highly extraordinary that he could resist the impulse to look where he was going.

He knew the train was 300 to 400 yards ahead of him when he left Lemay. He was in exclusive control of the track car. If he had looked east while the train was traveling the distance it took to stop after the brakes went into emergency, he could have observed the gap between his car and the end of the train was closing. The Petitioner makes no contention that Lucus was not negligent in running into the rear end of a train stopped on a level straight track on a clear sunny day when he knew the train was traveling 300 or 400 yards ahead of him.

It would not be contended by Petitioner that if Respondent had stopped its train for any one of many reasons other than the reason this train stopped and Lucus had run his track car into the train, he could recover. Suppose the train had stopped by emergency application of the brakes because of another track car or train or engine on the track. Liability to Lucus would not be claimed. But Petitioner claims that merely because of the *reason or occasion* of the stop, to wit, a disconnected air line—there is liability. Petitioner's contention is not based on the nature or any suddenness of the stop, but says that because it was occasioned by the disconnection of the air line there is liability. Apparently, Petitioner's legal position would be the same if the train had been stopped for an hour instead of a few minutes.

No claim or suggestion is made by Petitioner that Respondent did not have the unconditional right to stop its train at any time and place without owing the operator of a track car following the train the duty of any warning or lookout. When the train stops, it must necessarily remain on the track until moved again. There is no analogy

between a freight train on the track and a motor vehicle which is parked on the traveled portion of a highway. If the train had slowed down to 10 or 15 miles per hour and Lucus had continued going east at 30 miles per hour while looking west, the collision would have happened when he overtook the train. Lucus had no duties to perform which required him to look backward. His only duty was to deliver some checks to employees.

It is the contention of Respondent that there was no causal connection between the disconnection of the air line and the death of Lucus.

This Court had occasion to discuss and apply the rules of proximate cause in *Brady v. Southern Railway Company*, 320 U. S. 476, 88 L. Ed. 239. The deceased railway employee was killed in a switching movement when a car on which he was riding ran over a derailer and threw him under the wheels. Plaintiff relied upon negligence in not putting a light on the derailer and that some employee other than deceased closed the derailer. The Court held the evidence on these contentions was not sufficient to take the case to the jury.

The plaintiff also relied upon testimony that the rail opposite the derailer was defective and permitted the derailing of the car when that would not have occurred but for the defect. The Court holds the defendant was not required in the exercise of due care to anticipate that the crew would improperly back the train over the closed derailer.

> "We now turn to the third instance of alleged negligence. This is the existence to the knowledge of the carrier of a rail, opposite the derailer, so worn on top and sides that in the opinion of qualified experts it permitted the thrust of the east wheels of the car, as they rose over the 'wrong end' of the derailer, to force the flange on the west wheels over the defective rail and so to derail the cars, when no such derailment would have occurred, 'nine times out of ten, if the best type' rail was in use. There is no evidence

of the unsuitability of the rail for ordinary use."

"Such evidence, we assume, would justify a finding for petitioners, if the defective rail was the proximate cause of the derailment and the backing of the train improperly over the closed derailer a danger reasonably to be anticipated. As to the likelihood of cars passing over the wrong end of derailers, one witness with ten years' experience as a brakeman testified that he recalled three or four instances. Another, the Superintendent of the railroad with 22 years' experience said, 'It happens very frequently. I would say yes, I have seen it 25 to 50 times.' The rule as to when a directed verdict is proper, heretofore referred to, is applicable to questions of proximate cause. Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 351, 74 L. Ed. 896, 50 S. Ct. 281; St. Louis-San Francisco R. Co. v. Mills, 271 U. S. 344, 348, 70 L. Ed. 979, 983, 46 S. Ct. 520; New York C. R. Co. v. Ambrose, 280 U. S. 486, 74 L. Ed. 562, 50 S. Ct. 198; Baltimore & O. R. Co. v. Tindall (CCA 7th) 47 F. (2d) 19; Texas Gulf Sulphur Co. v. Portland Gas Light Co. (CAA 1st) 57 F. (2d) 801. Cf. Story Parchment Co. v. Paterson Parchment Co., 282 U. S. 555, 566, 75 L. Ed. 544, 550, 51 S. Ct. 248.

"The Supreme Court of North Carolina was of the view that striking a derailer from the unexpected direction 'was so unusual, so contrary to the purpose' of the derailer that provision to guard against such a happening was beyond the requirement of due care. With this we agree. Bare possibility is not sufficient. Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, at 475, 24 L. Ed. 256, at 259:

"'But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'

> "Events too remote to require reasonable prevision need not be anticipated. * * *"

The test of a danger "reasonably to be anticipated" as stated in the Brady case is a rule announced by all of the cases which analyze the doctrine of proximate cause. Petitioner at page 21 of his brief states:

> "* * * Unless the distance separating the track car and the rear of the train was sufficient for Lucus to stop the track car, a collision was made inevitable by the stop, and even if the distance was sufficient the danger was ever present that he would not discover the stalled train in time."

There is no evidence that the distance separating the track car and the rear of the train was not sufficient for Lucus to stop the track car if he had looked. The evidence is uncontradicted that the track car could be stopped in 100 feet going at maximum speed. The brakes were in good condition. The train moved at least 1350 feet after the brakes were applied. The evidence is uncontradicted that after the train had stopped Lucus still had more than five times the distance necessary to stop the track car if he had not insisted on riding backwards. The evidence is without dispute that Lucus could have stopped if he had looked where he was going and that he did not turn his head. The inquiry here narrows to the question under the rule of "reasonably to be anticipated": Was the defendant required to anticipate that Lucus would not keep any lookout ahead? We respectfully submit that no case relied on by Petitioner answers this question in his favor.

At page 19, of Petitioner's brief it is stated:

> "The Utah court's resurrection of the absolute defense of contributory negligence by calling such conduct the 'legal cause' is contrary to every Federal authority petitioner has been able to discover. The phrases 'legal cause' and 'proximate cause' are foreign to the Federal Acts in question; neither phrase is used in any section of the acts. They are

used and employed by the Utah court to obscure reason and justify a result not otherwise obtainable."

But Petitioner's brief quotes from opinions of this Court which use the phrase "proximate cause of injury" in cases under the Safety Appliance Act. The criticized phrase is found at the bottom of page 15 of Petitioner's brief in the quotation from *Louisville & Nashville R. Co. v. Layton*, 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931:

> "This effect can be given to the acts and their wise and humane purposes can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the *proximate cause* of the injury to them when engaged in the discharge of duty." (Italics ours.)

And Petitioner's brief at pages 16 and 17 quotes from *Brady v. Terminal R. Ass'n of St. Louis*, 303 U. S. 10, 58 S. Ct. 426, 82 L. Ed. 614, in part:

> "* * * The Statute has been liberally construed so as to give a right of recovery for every injury the *proximate cause* of which was a failure to comply with a requirement of the act. * * * One can recover if the failure to comply with the requirements of the act is a *proximate cause of the act* resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection." (Italics ours.)

The Utah court did not hold that contributory negligence of Lucus was an absolute defense. It held that the failure of the air line which stopped the train was not a proximate cause of the death of Lucus. The cases from this court upon which Petitioner relies hold the test of liability is the test of proximate cause. We agree that such is the law. It is our position that the failure of the air line was not a proximate cause of the death. The Restatement of

the Law quoted by the Utah court is the source of the phrase "legal cause" which obviously means the same as "proximate cause."

A clear and logical discussion of the rule of proximate cause is found in *Orton v. Pennsylvania R. Co.*, 7 F. (2d) 36, (C.C.A. 6) 1925. Ohio had a statute making it a misdemeanor for a railroad company unnecessarily to obstruct a public highway by permitting cars to remain across it for more than five minutes. There was evidence showing it had obstructed the country crossing in question for 20 to 30 minutes. Plaintiff was a guest in a car driven 25 or 30 miles an hour along the highway and into the side of the train. The road was straight and the accident happened about 9:00 o'clock at night. The court assumed the railroad was negligent and held such negligence was merely an incident and not a concurring proximate cause of the accident.

> "* * * A case in point is Gilman v. Central Vermont Ry., 93 Vt. 340, 107 A. 122, 16 A. L. R. 1102, in which it was held that the action of a railroad in obstructing a crossing for an unlawful length of time, in violation of a statute, was merely a condition and not the proximate cause of an injury resulting from a collision with the cars. See, also, Gage v. Boston & Maine Railroad, 77 N. H. 289, 90 A. 855, L. R. A. 1915A, 363; Trask v. Boston & Maine Railroad, 219 Mass. 410, 106 N. E. 1022. These cases, we think, illustrate the distinction between actionable negligence and a fortuitous circumstance too remote to be regarded as a concurring proximate cause of an injury. That the collision would not have occurred had the cars not have been permitted to remain across the highway is beside the question of casual connection. Lang v. Railroad, 255 U. S. 455, 41 S. Ct. 381, 65 L. Ed. 729; McCalmont v. Pennsylvania R. Co. (6 C.C.A.) 283 F. 736. The most that can be said for plaintiff is that defendant created a situation in which Inman's negligence operated to bring about the collision, which would have been true if the train had occupied the crossing only while pass-

> ing over it. Defendant's act was merely a condition and in no sense a concurring proximate cause of the injury."

In *Bobango v. Erie R. Co.*, 57 F. 2d 667, (1932 - C.C.A. 6) the court sustained a directed verdict for defendant. Plaintiff was a surveyor employed by the railroad and a member of his crew had left his rod upon the track. Plaintiff discovered its location as a train was approaching and in attempting to remove it he was struck by the train and injured. It is not claimed that the train crew was at fault. The contention is that the employee who left the rod on the track was negligent, and that whether his negligence was the proximate cause of the injury was a question for the jury. The court took the view that the injury was not proximately caused by the negligent act of the employee. "It could not reasonably have been expected that plaintiff, in the situation in which he found himself, would undertake to remove it." The suit was brought under the Federal Employers' Liability Act. Contributory negligence was no defense except to diminish the damage.

> "* * * While the rule of proximate cause does not require an anticipation of the precise injuries received, it is generally held that before there can be a finding of such cause it must be made to appear that the injury was a natural and direct consequence of the negligent act or, as sometimes stated, a consequence that ought to have been foreseen in the light of all the attending circumstances. * * *"

It could not reasonably have been expected that Lucus would operate his track car blindly into the standing train. There is nothing in the record to show that there was anything in the nature of either duty or interest to divert his attention from his task of operating the car. It would seem that the impulse or instinct to look where he was going would cause the expenditure of the slight time and effort required to turn his head and glance along the track.

In *Reynolds v. New York O. & W. Ry. Co.*, 42 F. (2d) 164, (C.C.A. 2), a collision occurred between a passenger train which was backing up on a curved track through embankments and a track motor car carrying four section men. The train had passed a flag station and was backing up a short distance to let off a passenger at the station. The track car finally reached a speed of 20 miles an hour and the men on it did not see the train because their backs were turned toward the direction from which the train was coming. Eastwood was operating the track car and the plaintiff's intestate was Reynolds. The train was either stopped or moving very slowly, when the collision occurred. The flagman on the train did not go back when the train stopped (before backing) and the violation of the rule relating to flagging a stopped train was the negligence alleged.

The court held the flagging rule does not relate to a track car and is not intended for the protection of its occupants. It is not a train. It could be stopped in 30 feet when going at a high speed. There was no duty to warn the men on the track car and negligence was not shown by failure to warn. Judgment for plaintiff was reversed.

In *Anna Lang, admx. v. New York Central Railroad Company*, 65 L. Ed. 729, 255 U. S. 455, the action was under the Safety Appliance Act. The defendant had a defective car loaded with iron on the siding at the station in Silver Creek, New York. The drawbar, the draft timber, and the coupling apparatus on the westerly end of this car were gone. This condition was known to the plaintiff's intestate prior to the accident. During a switching movement involving connecting three cars on the track where the crippled car stood, plaintiff's intestate was on one of these three cars for the purpose of setting the brakes and so placing them on this siding as not to come into contact with the crippled car. He went to the east end of the easterly car (on top) and his foot was resting on a small platform at the end of the car which is below the brake wheel. For some reason he did not stop the three cars moving on this track before coming into contact with the

crippled car. The cars collided and owing to the absence of coupler attached on the crippled car, intestate's leg was caught between the ends of the two cars and he was so injured that he died. It was not the intention of any of the crew to disturb or couple or to move the crippled car. The defendant railroad contended and the Court held, that the proximate cause of the accident was the failure of the deceased to stop the cars before they came into collision with the defective car, and that the absence of the coupler and drawbar was not a proximate cause or a concurring cause.

> "It was the duty of the crew, we repeat, and immediately the duty of Lang, to stop the colliding car ,and to set the brakes upon it 'so as not to come into contact with the crippled car,' to quote again from the trial court. That duty he failed to perform, and if it may be said that notwithstanding he would not have been injured if the car collided with had been equipped with drawbar and coupler, we answer, as the court of appeals answered: 'Still the collision was not the proximate result of the defect.' Or, in other words, and as expressed in effect in the Conarty Case, that the collision under the evidence cannot be attributable to a violation of the provisions of the law, 'but only had they been complied with, if (the collision) would not have resulted in the injury to the deceased.'"

In *St. Louis & San Francisco Railroad Company v. Fannie M. Conarty, admx.*, 59 L. Ed. 1290, 238 U. S. 242, it appeared that the deceased was killed in a collision between a switch engine and a loaded freight car having no coupling or drawbar at one end, these having been pulled out while the car was in transit. The car was about to be placed on an isolated track for repair. The deceased and two companions were standing on the footboard on the front of the switch engine, and when the car was observed, his companions stepped to the ground on either side of the track, while he remained on the footboard and was caught between the engine and the car at the end from

which the coupler and drawbar was missing. These appliances had they been in place would have kept the engine and the body of the car sufficiently apart to have prevented the injury. The deceased and his companions were not intending to and did not attempt to couple the defective car to the engine or handle it in any way. The court said that the principal question in the case was whether at the time he was injured the deceased was within the *class* of persons for whose benefit the Safety Appliance Act required automatic couplers and drawbars. The court points out that the purpose of the act relating to drawbars and automatic couplers is to enable the car to be coupled or uncoupled "without the necessity of men going between the ends of the cars."

> "* * * Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between colliding cars. On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate 'the necessity for men going between the ends of the cars.'
>
> "We are of the opinion that the deceased, who was not (251) endeavoring to couple or uncouple the car or to handle it in any way, but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit, and that the Supreme Court of the state erred in concluding that the safety appliance acts required it to hold otherwise."

In *Peters v. Wabash Ry. Co.*, 42 S. W. (2d) 588, (Supreme Court of Missouri, 1931) the action was under the Safety Appliance Act alleging the defendant used cars in interstate commerce not equipped with automatic couplers, which would couple upon impact. It was admitted that there was sufficient showing of the violation of the act. The defendant on appeal urged that the violation of the act was not the proximate cause of Peters' death. It appeared that Peters had made two attempts by giving the

necessary signal during the switching operation to have the cars involved coupled by impact. The accident happened at 11:00 at night and signals were being given by lantern. Finally on a third attempt, and after the unsuccessful attempts had moved the cars so that they were adjacent to a loading dock, the third attempt to couple the cars was successful. Immediately after the cars came together, Peters was on the ground either at the end or between those two cars giving a "kick" signal which was relayed to the engineer who then pushed the whole string of cars 50 or 60 feet further south. About ten minutes later Peters was found dead, crushed between the platform and the side of a car. There was evidence that he had been dragged or pushed along the side of the platform. The court held that the defect in the coupler was not the proximate cause of the death and did not contribute to cause the movement of the cars that killed him.

> "He was not killed while engaged in the coupling movement. It does not appear whether or not, prior to giving the third back up signal, he had gone between the ends of the cars to adjust the coupling, but we do not regard it as material whether he had or not. In either event, the coupling had been effected, that movement completed, and he was still uninjured, and but for his own act which brought about the further, and to him fatal, movement of the train would have been in safety. Had he, when the coupling was completed, climbed upon the platform, which was free of obstruction, or otherwise extricated himself from his then position before giving the kick signal he would not have been hurt. The movement of the engine and cars was under his control, and he was experienced in such work, and familiar with the environment. Keating testified that it was customary in such work to relay without question whatever signals were given by the switchman in charge of the movement if he was an experienced man, as Peters was. Clearly Peters' own negligent act constituted an efficient independ-

ent cause intervening between defendant's negligence and the injury complained of, but for which the accident would not have happened, and was the proximate cause of his death."

Deere v. Southern Pacific Company, 123 F. (2d) 438, Certiorari denied 315 U. S. 820, 86 L. Ed. 1217 was an action under the Federal Liability Act for the death of a signalman who was killed when a train collided with his inspection car which he was attempting to remove from the track. A judgment directing a verdict for defendant was affirmed on appeal. The court held that the signalman had the duty of removing the car from the track so that the approaching train might pass, and that he could not expect the trains to stop for him. The duty follows from the nature of such employment. Self-preservation has to rest on them because no adequate protection other than self-protection can be afforded them. One alleged ground of negligence was the failure of the company to furnish sufficient help on the maintenance car to permit it to be removed quickly from the track. Upon this point the court held that even if the failure to provide additional help was negligent, it was not the proximate cause of the injury:

"• • •

"But if it be conceded, arguendo, that defendant did not provide sufficient help, yet there is no showing whatever of a direct causal connection between that omission and the death of plaintiff's decedent. His death was not owing directly to the act of removing the speeder, but was due proximately to his failure to step aside from the path of the train, the approach of which was fully known to him, as is evidenced by the fact that he had begun to remove the speeder from the way of the train. He was free to handle his own movements; there was no superior's order requiring him to stay with the car at the risk of his life. Under these circumstances reasonable men must agree that the accident was not brought about through any failure to furnish

sufficient help, and there is therefore no question for the jury on this point. * * *"

Bohme v. Chicago M. & St. Ry. Co., 200 N. W. 804, (Supreme Court of Minnesota. Nov. 21, 1924). Plaintiff was a rear brakeman and as the train was moving slowly, he heard the brakes squealing on the second car in front of the caboose and knew that they were sticking. It was in the night and dark and cloudy. He started down the ladder on the side of the front end of the car for the purpose of bleeding the brake. He looked down and saw a dark bank which he took to be the ground. Without lowering his lantern to see what was beneath him, he stepped off the ladder and fell through a bridge over which the train was passing and was seriously injured. The action was under the Safety Appliance Act. The sole question presented was whether the defective brake was the proximate cause of the injury within the purview of the federal act. The court reviews many cases and concludes that the action of the trial court in rendering judgment for defendant notwithstanding verdict for plaintiff was correct.

"Applying to the present case the test announced and applied in the cases cited makes it clear that the defect in the brake was not the proximate cause of the accident which resulted in plaintiff's injury. He had not entered upon the work of remedying the defect. While the defect furnished the occasion for him to go along the top of the cars, it did not produce the condition, nor bring into operation a force, which caused him to fall. It caused no movement of the train, no jar or jerk. If plaintiff had alighted in the same manner at the same place for the purpose of boarding the caboose as it passed, or for any other purpose, the result would have been the same. The condition of the brake had no direct causal connection with the fact that he 'stepped out into space,' as he termed it, instead of on the ground. As pointed out in the above cases the statute does not make the company an insurer of the safety of its employees against all accidents, but only against

those resulting proximately from a failure to comply with its requirements. Where an employee, while on his way to adjust a defective appliance, or while returning from making such an adjustment, meets with an accident from another independent cause, the Safety Appliance Act has no application.

"It follows that the learned trial court reached the correct conclusion, and that the judgment must be, and is, affirmed."

In *Powell v. Waters*, 190 S. E. 615, the action was brought under the F. E. L. A. and the Safety Appliance Law. The deceased was an engineer on a train in Georgia, and on a hot afternoon the air pump which was part of the brake system became stuck because of its faulty condition, thus rendering the system of air brakes useless. The deceased worked on the pump in the heat for about an hour and then assisted in bleeding the air out of the train in order to continue and then ran the train into Savannah at a low rate of speed because there were no brakes. On arrival at Savannah, his condition was critical and the defendant's doctor was called, but the deceased died at 7:00 that evening. The court held the defective air pump was not the cause, but a mere condition, and held that the lower court erred in overruling the general demurrer to the petition. The following syllabus is by the court:

"1. In an action against a railroad company for injury to one of its employees based on the defendant's violation of a federal statute, in order to render the company liable there must necessarily be, as in other cases, a causal connection between such violation and the injury. (a) 'The most generally accepted theory of causation is that of natural and probable consequences (Mayor, etc. of Macon v. Dykes, 103 Ga. 847, 848, 31 S. E. 443); and in order to hold the defendant liable the petition must show either that the act complained of was the sole occasion of the injury, or that it put in operation other causal forces, such as were the direct, natural, and probable consequences of the original act, or that

the intervening agency could have reasonably been anticipated or foreseen by the original wrongdoer.' Rome Railway, etc. Co. v. Jones, 33 Ga. App. 617, 618, 127 S. E. 786.

"(b) An employee of a railroad company cannot recover under the Safety Appliance Act, 45 U. S. C. A. Sec. 1 et seq., if the failure to comply with its requirements is not the proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation, in which the accident, otherwise caused, results in such injury."

The following headnotes from *Reetz v. Chicago & E. R. Co.*, 46 F. (2d) 50 (C.C.A. 6) reflect the facts involved and the holding of the court:

"Railroad held not liable for freight conductor's death for failure to provide footpath and guard railings along bridge abutment.

"Deceased fell from bridge while endeavoring to locate place in train where breaking of couplers and drawbars had broken air line and brought train to stop. However, record did not show railway negligent in method of constructing bridge or in maintaining it, and there was no evidence that guard railings or footpaths were used in open country nor that their absence was proximate cause of injury.

"Railway operating train with defective couplers and drawbars held not liable under statute for freight conductor's death, which was not proximate result thereof (Safety Appliance Act. (45 USCA Secs. 1-16.))"

This Court in *Great Northern Ry. Co. v. Wiles*, 60 L. Ed. 732, 240 U. S. 444, held there could be no recovery for the death of a brakeman on the caboose of a train which broke in two because the drawbar pulled out and stopped the train instantly. Another train following ran into the

caboose because the deceased failed to perform his duty to immediately put out signals to protect the stopped train as required by rule. The Minnesota court held the doctrine of res ipsa loquitur applied from the pulling out of the drawbar and submitted the case to the jury on the theory of comparative negligence.

> "There is no room for the application of the rule of comparative negligence established by the employers' liability act of April 22, 1908, (35 Stat. at L. 65, Chap. 149, Comp. Stat. 1913, Sec. 8657), where the rear brakeman of a parted freight train, disregarding his duty to protect the rear of his train by going back a short distance and giving the warning signals which the carrier's rules required, remained in the caboose and was killed there when a passenger train, which he knew was closely following, ran into the standing train, since his was the causal negligence, even if negligence could be imputed to the carrier from the pulling out of the drawbar which caused the train to break in two, there being no claim that the passenger train was negligently run."

This Court, in *Johanna Frese, admx. v. Chicago Burlington and Quincy Railroad Company*, 68 L. Ed. 131, 263 U. S. 1, held plaintiff could not recover for an injury due "primarily" to the failure of the deceased to act. Frese was the engineer on a Burlington train which collided with a Wabash train at a crossing of the tracks on the same level. A statute of Illinois made it the duty of the engineer to stop within 800 feet and positively ascertain that the way is clear. The Wabash train was approaching (after both trains had stopped for the crossing) from the Burlington fireman's side of the engine and the plaintiff alleged negligence of the fireman. The court pointed out the statute made it the personal duty of the engineer to ascertain that it was safe to resume the course.

> "The plaintiff contends that there was evidence of contributory negligence on the part of the fire-

man, Savage, and therefore, even if Frese was negligent, that would not be a bar to the action under the Employers' Liability Act. But the only evidence as to the fireman came from a man who was standing on the ground as the engine passed him. He says that it looked to him that the fireman then was looking through the front window at that time, and that he continued in that position up to say 50 or 60 feet from the crossing of the tracks. The fireman was on the left, on the side of the other approaching train; the engineer on the right, where he could not see so well. But of course the witness could not testify which way the fireman turned his eyes after he saw only his back, and it is a mere speculation to argue that Savage did not do all that he could. Moreover, the statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice, he could not escape this duty, and it would be a perversion of the Employers' Liability Act (April 22, 1908, chap. 149, Sec. 3, 35 Stat. at L. 65, 66, Comp. Stat. Sec. 8659, 8 Fed. Stat. Anno. 2d ed. p. 1339) to hold that he could recover for an injury primarily due to his failure to act as required on the ground that possibly the injury might have been prevented if his subordinate had done more. See Great Northern R. Co. v. Wiles, 240 (4) U. S. 444, 448, 60 L. Ed. 732, 734, 36 Sup. Ct. Rep. 406. * * *"

While the court did not give a name to the legal rule it applied, we submit the court, applying common sense to the facts, was of the opinion the negligence of the engineer was the proximate cause since he had the primary duty. In the phrase of that case, it would be a perversion of the Federal Act to hold that Lucus could recover for an injury primarily due to his failure to act.

Morse v. Pennsylvania R. Co., 74 F. (2d) 677, (C.C.A. 2), reports a decision in a F. E. L. A. case by Augustus N. Hand, Circuit Judge. The plaintiff was a signal main-

tainer riding along the track on the track car. It became stalled on a highway crossing by cinders in flangeways of the rails just as a motorist named Jensen approached the crossing. As the two vehicles struck, plaintiff jumped and broke his leg. The court held the cinders in the flangeways were a condition rather than a cause of the accident:

> "Jensen not only should have seen the track car long before he did, but should have had such control over his automobile, even when so short a distance away from the track car as 16 feet, that he could avoid a collision. We can see nothing that prevented him from exercising such control, even up to the last moment, and we hold that his negligence in running the Ford coupe into the plaintiff's car was the proximate cause of the latter's injuries. Instead of waiting for the track car to get beyond and to the south of the highway, Jensen relied on passing over the rails the moment the track car would naturally, in view of apparent probabilities, have got beyond the crossing. He would have been fully as justified in taking his chances if the plaintiff had deliberately stopped the track car at the crossing in order to do some work there as he was when it suddenly became stalled. The stopping of a car on a railroad track, whether voluntary or involuntary, cannot be regarded as an act of negligence.
>
> "Any defect in the crossing, due to the presence of too large a mass of fine cinders or to the failure to clean out the flangeways so that they would not become clogged and endanger traffic, we regard as a condition rather than a cause of the accident."

In view of Petitioner's reliance upon the Gotschall case (244 U. S. 66) and the Layton case (243 U. S. 617) and Respondent's reliance upon the Conarty, Lang and Wiles cases (supra) it is interesting for this court to examine *McCalmont v. Pennsylvania R. Co.*, 283 F. 739, (C.C.A. 6) where all of these cases are discussed and shown to not be

in conflict. McCalmont was injured while shortening a chain on a car with a defective coupler, standing with others on a dead track used to assemble cars in need of repairs. While thus engaged, he failed to set out a blue flag (required by rule) to indicate to others that he was working under or about the car and to prevent it being coupled or moved. Another car was kicked onto the same track, hit the car on which McCalmont was working and he was killed. The action was under the Safety Appliance Act. The defense was that the defective coupler was not the proximate cause of the death. The action of the trial court directing a verdict for defendant was affirmed.

> "If, however, there were otherwise doubt about the conclusion that the defective coupler was not the proximate cause of McCalmont's death, it would be removed by observing and applying the ruling of the Supreme Court in the Wiles Case, 240 U. S. 444, 36 Sup. Ct. 406, 60 L. Ed. 732. This opinion points out that even in the presence of negligence by defendant which set in motion the train of events and without which the injury would not have happened, yet the plaintiff's own conduct and negligence may be such as to become the intervening and sole proximate cause, leaving the defendant's negligence as a remote cause only. Upon its facts as they are assumed by the Supreme Court, we cannot distinguish that case from this. It is true that the right to recover was not planted upon the Safety Appliance Act, but upon negligence under the Employers' Liability Act, and that any contributory negligence on the plaintiff's part would have diminished the recovery under the Employers' Liability Act (Comp. St. Secs. 8657-8665) rather than have been wholly immaterial under the Safety Appliance Act; *but the court was not deciding the effect of contributory negligence, but only whether the plaintiff's conduct was contributory negligence or was the sole proximate cause.* It could make no difference whether the defendant's negligence in

permitting the train to break apart and thus bring Wiles into a place where he was in danger and was killed, was a disputed inference which a jury might draw under the one act, or a presumption of law which must be indulged under the other act. The Supreme Court assumed (240 U. S. 448, 36 Sup. Ct. 408, 60 L. Ed. 732) that there might be negligence, actionable under the Employers' Liability Act, which thus brought Wiles into the position where he was exposed to the danger of an unintended collision, just as the absence of the necessary coupler brought McCalmont into a similar position. Wiles knew, as McCalmont did, that in the regular and ordinary operation of the road such a collision as did take place was liable to occur at any moment. It was Wiles' clear duty, as it was McCalmont's, to take a certain prescribed step which, if taken, would prevent the collision. In each case there was neither negligence in bringing about the collision nor cause for the collision, except the failure of the man hurt to take that step which it was his duty to take to protect himself and others. If Wiles had gone back with his flag, as his duty required, that collision probably might have been avoided. If McCalmont had set out his flag as his duty required, it is even more probable that there would have been no collision. Our affirmance of the judgment below could safely be rested on the Wiles Case alone."

Plaintiff relies upon *Spokane and Inland Empire Railroad Company v. Edgar E. Campbell,* 60 L. Ed. 1125, 241 U. S. 497. There Campbell moved the electric train westbound from Coer d'Alene when he discovered an eastbound train approaching on the same track. The airbrakes on Campbell's train failed to work properly and a collision resulted. Of course, it could be reasonably foreseen that if the air brakes were defective that might cause a collision with anything on the track including an approaching train. The Campbell case would suport a claim that if the brakes on the *track car* failed to operate (if Lucus applied them, which he did not) and a collision resulted for this reason

there would be causal connection between the faulty brakes and the collision. The case gives no support to the contention that there is any causal connection under the entirely different facts in the case at bar.

The Respondent would not be liable if the stop had been caused by the engineer applying the air because it is not reasonably to be anticipated that the operator of the track car would fail to see the train stopped on the track. It is for the same reason that the disconnection of the air line is not the proximate cause of the rear end collision.

Mrs. Lucus Was Not Damaged by the Death of William Frank Lucus.

Upon the trial of this case it was undisputed that the deceased and his wife were not living together at the time of the death and had not lived together for approximately two years prior thereto. (R. 57-59) During this period, he had furnished her no support whatever. (R. 58-59, 109) She had been employed ever since they were married on December 26, 1936. (R. 55) There were no children, and as shown by defendant's Exhibit 4, on March 18, 1943, when Frank Lucus applied for employment, he stated in his application "Am supporting no one." (R. 142-B) There was also introduced in the trial court as defendant's Exhibit 1, a transcript of divorce proceedings in the Superior Court of California in and for the County of Los Angeles in the case entitled Wm. Frank Lucus vs. Edith N. Lucus. That record shows that on August 27, 1942, the deceased filed an action against his wife for divorce, alleging

> "That since the date of said marriage, the defendant has treated plaintiff in a cruel and inhuman manner, and has wrongfully inflicted upon him grievous suffering, pain and anguish; that all of said acts and conduct of said defendant were without excuse, cause or provocation, and caused plaintiff to suffer shame, embarrassment and humiliation,

and caused him to become ill in mind and body, and impaired his health and happiness." (R. 105)

Mrs. Lucus, thereafter on September 15, 1942, filed a cross complaint for separate maintenance, in which she stated under oath:

"That plaintiff deserted and abandoned defendant more than a year prior to the commencement of his action and lived separate and apart from the defendant against the will and wishes of the defendant; that during all of said time said plaintiff did not contribute anything to the support of defendant and did not supply her with the necessities of life; that during the entire married life of the parties the defendant has been forced to work and earn her livelihood and necessities of life; that plaintiff has always earned more than enough money to support defendant but has failed, neglected and refused so to do; all of which has been do to no fault of the defendant.

"That plaintiff squanders his money on liquor, in bars and on friends and acquaintances with whom he associates with at public drinking places, constantly drinking to excess.

"That defendant has pleaded and begged plaintiff to give up his disreputable friends, to cease patronizing public bars and to return home and live with defendant; that plaintiff has persistently refused to do so; that due to his excessive drinking, plaintiff has become, in the past, involved in several grievous difficulties, from which defendant was able to extricate him only after great and costly effort; that due to plaintiff's conduct, defendant worries about him and is in constant dread that he will again become involved in difficulties; that her worry has been so great that it has affected her health and she cannot sleep or rest properly, has lost her appetite and is almost physically exhausted; that she is in need of medical attention and cannot afford to

> pay for it; that she fears that she may have to quit her job because of her health; that unless she receives financial aid from plaintiff she will suffer to a great extent." (R. 109)

It further appears from the record that among other proceedings resulting from this divorce litigation Frank Lucus was ordered on January 6, 1943, to pay his wife $10.00 per week for her support commencing February 1, 1943. (R. 127) Shortly after this order was entered, Frank Lucus left Los Angeles without paying anything to his wife on account of the order or otherwise, and on March 18, of that year started to work for the Southern Pacific Company in the State of Utah. (R. 59, 142-B) The testimony in the record shows that there was nothing left of the marriage relation between Frank Lucus and Edith Lucus except the bare technicality that the divorce had not been granted. He left the State of California obviously for the purpose of defeating her intention of making him pay her support money. He was 39 when he died and she was 49. (R. 54-55) Her only hope of future support was legal duress of a spouse who was determined not to pay. She had alleged under oath that his society and association was destroying her health. To permit a jury under these circumstances to return any judgment for the wife would result in a verdict based on pure speculation and conjecture. If a jury had found that based on the bare possibility that in spite of the overwhelming evidence to the contrary at some time in the future there might have been a reconciliation of these parties, such a finding would not be supported by any testimony, but would be based on pure guess work, and contrary to all the evidence.

The rule of damages in cases under the act has been clearly announced by the Supreme Court. In *American Railroad Co. v. Didrickson*, 57 L. Ed. 456, 227 U. S. 145, the court said:

> "The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by

> the wrongful death of the injured employee. The damage is limited strictly to the financial loss thus sustained."

Michigan Central R. Co. v. Vreeland, 57 L. Ed. 417, 227 U. S. 59, involved a widow's action for the death of her husband. The court held:

> "The financial benefit which might reasonably be expected from her husband in a pecuniary way is the measure of damages in an action brought against an interstate railroad carrier under the employers liability act of April 22, 1908, for the benefit of the widow of an employee killed while engaged in interstate commerce."

Mere status of husband and wife followed by the death of the husband does not show pecuniary loss. In addition to the status there must be a reasonable expectation of future support and maintenance. This essential was totally absent in this case.

The record made in the trial court would seem to require the conclusion that Lucus died not at all because the train came to a stop, but only because Lucus, knowing the train was ahead of him, persisted in riding backwards with no thought or care for his own safety, until he propelled the little track car at unchecked speed into the caboose. Likewise, the conclusion seems to be required by the record as a matter of law that Lucus' death resulted in no pecuniary loss to Mrs. Lucus. By her sworn statement in the California divorce case, Lucus contributed nothing to her support while they lived together. By her testimony upon the trial below, Lucus made no contribution to her while he lived in Utah and worked for Respondent. So clear was it in the mind of Mrs. Lucus, that she had no fair hope of recovering financial help from Lucus, she did not even make a good faith effort to discover his whereabouts or communicate with him during the fourteen months he worked for Respondent.

The result in the trial court and in the Supreme Court of Utah was clearly correct and resulted in justice between

the parties. Petitioner has been unable to point to any fact which would justify a finding of any causal connection between the stopping of the train and the death of Lucus. Neither has he been able to point out any basis for a finding that Mrs. Lucus suffered any pecuniary loss by Lucus' death. No claim was ever made by the administrator that anyone other than Mrs. Lucus was dependent upon Lucus.

Petitioner complains here of the language employed by the Supreme Court of Utah. We submit that not only did the Supreme Court of Utah correctly decide the case, but that the reasons assigned for its decision are sound. But, the case having been properly decided, the reasons for the decision are immaterial upon review and cannot be the basis for reversal.

This Court has stated the rule applicable here in *Helvering v. Gowran*, 82 L. Ed. 224, 302 U. S. 238:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. Frey & Son v. Cudahy Packing Co. 256 U. S. 208, 65 L. Ed. 892, 41 S. Ct. 451; United States v. American R. Exp. Co. 265 U. S. 425, 68 L. Ed. 1087, 44 S. Ct. 560; United States v. Holt State Bank, 270 U. S. 49, 56, 70 L. Ed. 465, 469, 46 S. Ct. 197; Langnes v. Green, 282 U. S. 531, 75 L. Ed. 520, 51 S. Ct. 243; Stelos Co. v. Hosiery Motor-Mend Corp. 295 U. S. 237, 239, 79 L. Ed. 1414, 1416, 55 S. Ct. 746; cf. United States v. Williams, 278 U. S. 255, 73 L. Ed. 314, 49 S. Ct. 97. * * *"

Conclusion

The decision of the Supreme Court of Utah correctly holds, in harmony with the decisions of this Court, that the death of Lucus was not proximately caused by the safety appliance failure. The decision is correct also be-

cause the testimony shows without dispute that the widow of Lucus did not suffer any pecuniary loss as the result of his death.

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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